Supreme Court, U.S.
FILED

97 • 384 AUG 27 1997

OFFICE OF THE CLERK

NO. 96-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CONNIE RESHARD *and* LEROY RESHARD,
Co-Personal Representatives of the Estate of MINNIE LEE RESHARD on Behalf of the Estate *and* Certain Survivors,

Petitioners,

VERSUS

DR. EARL BRITT, DR. GEORGE BONK,
DR. DAVID MOORE, DR. PANKAJ CHOKHAWALA,
TALLAHASSEE MEDICAL CENTER, INC.
d.b.a., TALLAHASSEE COMMUNITY HOSPITAL,

Respondents,

VERSUS

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER,

Defendant.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CONNIE RESHARD, ESQUIRE
1101 THIRD STREET, S.W., SUITE 812
WASHINGTON, D.C. 20009
202-484-7002

August 27, 1997

ATTORNEY FOR PETITIONERS

185 pp

QUESTIONS PRESENTED

1. Whether the combined sanction of dismissal of the action, attorney's fees and costs by the district court lacked finality before the amount of fees were set or is otherwise void due to bias and prejudice by two panel members.

2. Whether the sanction of dismissal of the action and attorney fees violated due process of law and Rule 37(b)(2), Fed. R. Civ. P., generally and in part, because the removal of the decedents heart and aorta is a protected property interests under the Fifth Amendment.

3. Whether dismissal of the appeal is invalid because the sanction of dismissal, affirmed in an earlier appeal before finality, is still justiciable and jurisdictional in the current appeal.

TABLE OF CONTENTSCONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW II

JURISDICTIONAL STATEMENT III

UNITED STATES CONSTITUTIONAL PROVISIONS III

STATEMENT OF CASE 1

A. Statement Of Facts 1

B. Course Of Proceedings 5

REASONS FOR GRANTING THE WRIT OF CERTIORARI 8

I. WHETHER THE COMBINED SANCTIONS OF DISMISSAL, ATTORNEYS FEES AND COSTS LACKED FINALITY BEFORE THE AMOUNT OF FEES WERE SET 10

A. Dismissal Of Current Appeal Was Err Since The Second Appeal, No. 92-3542 Lacked Finality 10

B. Local Bias Violates Article III of The U.S. Constitution And Contributed To the Perpetuation Of The Lack Of Finality Issue 13

1. The Appearance Of Impropriety Is Sufficient Basis For Disqualification And Vacation Of Appeal Two, No. 91-3542 14

2. Only The Court Sitting En Banc Should Decide Whether To Vacate The Second Appeal. 15

C. Collateral Estoppel And Res Judicata Are Not A Bar. 15

II. WHETHER ORDER OF DISMISSAL VIOLATED DUE PROCESS OF LAW AND FEDERAL STATUTES, IN PART, BECAUSE THE REMOVAL OF THE DECEDENTS HEART AND AORTA VIOLATED THE CONSTITUTIONAL GUARANTEED PROPERTY INTERESTS OF PLAINTIFFS. 17

A. Removal And Concealment Of Decedent's Heart Violates Petitioners' Property Interest.....19

B. Alternatively, Sanction of Dismissal Plus Attorney Fees is Reversible Error.....20

1. Sanction Must Be Subject of Proper Discovery Order.....20
2. Lack Of Prior Sanctions And Warning Of Dismissal And Severity of Sanctions Are Reversible Error. 21
3. Failure Of District Court To Make Correct Material Findings Of Fact Under Rule 52 Violates Due Process 0f Law and To Grant A Rule 60 (b) Motion Is Reversible Error. 24

III. WHETHER DISMISSAL OF THE APPEAL IS INVALID BECAUSE THE ISSUE OF DISMISSAL IS A SECONDARY ARGUMENT IN SUPPORT OF REDUCTION OF THE AMOUNT OF ATTORNEY FEES AND JUDICIAL DISQUALIFICATION ----------26

A. Issue Of Dismissal Is Permissible Element In Support Of A Reduction In Attorney Fees 26

B. Issue Of Disqualification Of District Court Judges Is Permissible And Issue Of Dismissal Valid Element Of Argument.....27

1. Local Bias And Racial Prejudice Are Relevant Issues. 27
2. Discussion Of Sanction Of Dismissal Relevant To Extrajudicial Exception To Disqualification----------28

CONCLUSION.....30

APPENDIX

TABLE OF AUTHORITIES AUTHORITIES

Page

SUPREME COURT CASES

Anderson v. City of Bessemer City, N.C.,
470 U.S. 578, 105 S.Ct. 1504 (1985)---25

Anderson v. Liberty Lobby, Inc.,
447 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)---24

Antoine v. Byers & Anderson, Inc.,
508 U.S. 429, 113 S.Ct. 2167 (1993)---16, 21, 28

Boddie v. Connecticut,
401 U.S. 371, 91 S.Ct. 780 (1971)---17

Beech Aircraft Corp. v. Rainey,
488 U.S. 153,109 S.Ct. 439, 102 L.Ed.2d 445 (1988)---25

Blonder-Tongue Laboratories, Inc. University of Illinois Foundation, 402 U.S. 313,
91 S.Ct. 1434, 28 L.Ed.2d 788 (1971)---17

Board of Regents v. Roth,
408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)---19

Bundinich v. Becton Dickinson and Co.,
486 U.S. 196, 108 S.Ct. 1717 (1988)---8, 10, 11

Caterpillar, Inc. v. Lewis,
__ U.S. __, 65 U.S.L.W. 4021 (12/10/96)---10

Catlin v. United States,
324 U.S. 229 (1945)---8

Chambers v. NASCO, Inc.,
111 S.Ct. 2123 (1991)---9, 18, 21, 23, 24

Coopers & Lybrand v. Livesay,
437 U.S. 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)---10

Goldberg v. Kelly,
397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)---19

Gompers v. Bucks Stove & Range Co.,
221 U.S. 418 (1911)---18

Henlsey v. Eckerhart,
461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d. 40 (1983)---26

Hickman v. Taylor,
67 S.Ct. 385, 329 U.S. 495, 91 L.Ed 451 (1947)---III, 20

Hovey v. Elliott,
167 U.S. 409 (1897) ---------- 18
In re Murchison,
349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 767 (1955) ---------- 14
Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee, 456 U.S. 694,
102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)----------9, 18, 22
Izumi Seimitsu v. U.S. Philips Corp.,
114 S.Ct. 425, (1993) ---------- 12
Lake Country Estates, Inc. v. Tahoe Planning Agency,
440 U.S. 391, 99 S.Ct. 1171 (1979) ---------- 12
Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)---------- 25
Liteky, et al. v. United States,
510 U.S. 540, 114 S.Ct. 1147 (1994)---------- 14, 16, 28
Logan v. Zimmerman Brush Co.,
455 U.S. 422,102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ---------- 20
Lytle v. Household Mfg., Inc.,
494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990)---------- 9
Mallard v. United States District Court for Southern District of Iowa,
490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989)---------- 28
Matthews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ----------17, 19
Memphis Light Gas Water Div. v. Craft,
436 U.S. 1, 9, 98 S.Ct. 1554 56 L.Ed.2d 30 (1978)---------- 19
Montana v. United States,
440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)---------- 17
National Hockey League v. Metropolitan Hockey Club, Inc.,
427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 7471 (1976) ---------- 18
Parklane Hosiery Co., Inc. v. Shore,
439 U.S. 322, 99 S.Ct. 645 (1979)---------- 15
Perkins v. Standard Oil Co.,
399 U.S. 222 (1968) ---------- 26
Poyner v. Murray,
113 S.Ct. 2397(1993)---------- 17
United States v. F & M. Schaeffer Brewing Co.,
356 U.S. 227 (1958) ---------- 8, 10

United States v. U.S. Gypsum Co.,
333 U.S. 364, 68 S. Ct. 525 (1947) ---------- 25
White v. New Hampshire Dep't of Employment Security.,
455 U.S. 445 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) ---------- 8, 10

FEDERAL CASES

Adriana International Corp. v. Thoren,
913 F.2d 1406 (9th Cir. 1990) ---------- 22
Aetna Casualty & Surety Co. v. Gosdin,
803 F.2d 1153 (11th Cir. 1986) ---------- 29
Alltmont v. United States,
177 F.2d 971 (3d Cir. 1949), *cert.. denied*, 339 U.S. 967 (1950) --- III
Anderson v. Sheppard,
856 F.2d 74 (6th Cir. 1988) ---------- 14
Andrews v. Employees' Retirement Plan,
938 F.2d 1245 (11th Cir. 1991) ---------- 11
Ankla, Inc. v. United States,
37 F.3d. 621 (Fed. Cir. 1994) ---------- 15, 16
Aztec Steel Co. v. Florida Steel Corp.,
691 F.2d 480 (11th Cir. 1982) ---------- 24
Bradley v. School Board of City of Richmond, Virginia,
324 F.Supp. 439 (D.C.VA 1971) ---------- 29
Britton v. Co-op Banking Group,
916 F.2d 1405 (9th Cir. 1990) ---------- 11
Brotherton v. Cleveland,
923 F.2d 477 (6th Cir. 1991) ---------- 9, 19, 20
Buchanan v. United States,
Nos. 95-3057 & 95-3145, slip op. (7th Cir. 8/2/96) ---------- 11
Caterpilla, Inc. v. Lewis,
__U.S.__, 65 U.S.L.W. 4021 (12/10/96) ---------- 10
Cleveland v. Berkson,
878 F.2d 1034 (7th Cir. 1989) ---------- 11
Cooper v. Salomon Brothers, Inc.,
1 F.3d 82 (2d Cir. 1993) ---------- 11
Donaldson v. Clark,
786 F.2d 1570 (11th Cir. 1986), *rev'd.*,
819 F.2d 1551, (11th Cir. 1987) (en banc) ---------- 9, 22
Doyle v. Murray,
938 F.2d 33 (4th Cir. 1991) ---------- 29

Equal Employment Opportunity Commission v. Carter Carburetor, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 865 (1979)---23
Fjelstad v. American Honda Motor Co., 762 F.2d 1334 (9th Cir. 1985)---18
Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d. 675 (D.C.Cir. 1996)---11
Herzog Contracting Corp. v. McGowen Corp., 976 F.2d 1062 (7th Cir. 1993)---11
Ierna v. Arthur Murray Int'l Inc., 833 F.2d 1472 (11th Cir. 1987)---11
In re Rubin, 769 F.2d 611 (9th Cir. 1985)---11
Jaffe v. Sundowner Properties, Inc. 808 F.2d 1425 (11th Cir. 1987)---11
John v Barron, 897 F.2d 1387 (7th Cir. 1990)---11
Jones v. Jones (In re Jones), 9 F.3d 878 (10th Cir. 1993)---11
King v. McCord, 621 F.2d 205 (5th Cir. 1980)---26
Malone v. United States, 833 F.2d 128 (9th Cir. 1987) *sub nom Malone* 458 U.S. 819, 109 S.Ct. 59, 102 L.Ed.2d 37 (1988)---23
Normal v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988)---26, 27
Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1978)---20
Redd v. City of Phenix City, 934 F.2d 1211(11th Cir. 1991)---29
Reshard v. Britt, 819 F.2d 1573 (11th Cir. 1987), *rev'd., vacated*, 831 F.2d 222 (11th Cir. 1987), *aff'd. on other grounds*, 839 F.2d 1499 (11th Cir. 1988) (en banc)---4
Rittenhouse v. DeKalb County, 764 F.2d 145 (11th Cir. 1985)---20

Roberts v. Bailar,
625 F.2d 125 (6th Cir. 1980) ---- 14
Shannon v. Eckerd Corp.,
55 F.3d 561(11th Cir. 1995) ---- 11
Slimfold Mfg. Co. v. Kinkdead Industries, Inc.,
932 F.2d 1453 (Fed. Cir. 1991) ---- 27
Southern Ry v. Campbell,
309 F.2d 569 (5th Cir. 1962) ---- III
Southern Travel Club v. Carnival Airbus,
986 F.2d 125 (5th Cir. 1993 ---- 11
Taylor v. Texgas Corp.,
831 F.2d 255 (11th Cir. 1987) ---- 11
Turnbull v. Wilcken,
893 F.2d 256 (10th Cir. 1990) ---- 11
United States v. Camper,
66 F.3d 229 (9th Cir. 1995) ---- 12, 15
United States v. Halderman,
559 F.2d 31 (D.C. Cir. 1976) ---- 28
United States v. Microsoft Corp.,
56 F.3d 1448, 312 U.S.App.DC 378 (1995) ---- 15, 30
United States v. Tucker, et al.,
No. 95-3268 (Slip op.) (8th Cir. 3/15/96) ---- 13
Varnes v. Local 91, Glass Bottle Blowers Ass'n.,
674 F.2d 1365 (11th Cir. 1982) ---- 11
Whaley v. Tuscola County,
58 F.3d 1111 (6th Cir. 1995) ---- 9, 19
Wolfson v. Palmieri,
396 F.2d 121 (2d Cir. 1968) ---- 28
World Thrust Films, Inc. v. Int'l. Family Intertainment, Inc.,
41 F.3d 1454 (11th Cir. 1995) ---- 9, 22
Wyle v. J. Reynolds Industries, Inc.,
709 F.2d 585 (9th Cir. 1983) ---- 23

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, §§ 1 & 2 ---- IV
U.S. Const. amend. V ---- IV
U.S. Const. amend. XIV ---- IV

STATUTES

28 U.S.C. A. § 144 (West Supp. 1997) ---- 14, 28
28 U.S.C. A. § 372 (West Supp. 1997) ---- 14
28 U.S.C. A. § 455 (West Supp. 1997) ---- 14, 28
28 U.S.C. A. § 636 (b)(1)(A)(B)(C) (West Supp. 1993) ---- II
28 U.S.C. A. § 753 (West Supp. 1997) ---- 14, 21, 28
28 U.S.C. A. § 1254 (West Supp. 1997) ---- III
28 U.S.C. A. § 1291 (West Supp. 1997) ---- passim
28 U.S.C. A. § 1332 (a)(1)(West Supp. 1997) ---- 1, 13
Fed R. App. P. 27 ---- 6
Fed. R. Evid. 401 ---- 29
Fed. R. Evid. 402 ---- 29
Fed. R. Evid. 403 ---- 29
Fed. R. Evid. 404 ---- 29
11th Cir. R. 33-1(a)(1) and (b)(1) ---- 5
11th Cir. R. 34 ---- 13
11th Cir. Rule 27(f) ---- 6, 7, 13, 15
Fed. R. Civ. P. 11 ---- 11
Fed. R. Civ. P. 12(b) ---- 12
Fed. R. Civ. P. 26-37 ---- passim
Fed. R. Civ. P. 30 ---- III
Fed. R. Civ. P. 32 ---- III
Fed. R. Civ. P. 52 ---- 20, 24
Fed. R. Civ. P. 59 (e) ---- II
Fed. R. Civ. P. 60(b) ---- 16, 25, 26
Fed. R. Civ. P. 72 ---- II
Fla. Stat. §§ 245.06-245.16 ---- 19
Fla. Stat. § 395.3015 ---- 22, 24
Fla. Stat, § 406.01-406.17 ---- 19
Fla. Stat. § 768 *et seq* ---- 1
Op.Atty.Gen. 93-70, October 8, 1993 ---- 19
Op.Atty.Gen. 73-275, August 14, 1973 ---- 19

PERIODICALS

Diagnostic 7 Statistical Manual of Mental Disorders (DSM-111-R), 3rd ed, American Psychiatric Association, Washington, D.C., 1987 ---------- 2

Gordy & Gray, *Attorney's Textbook of Medicine*, Vol. 3A, 3rd ed., M. Binder (1973) ¶ 76.1 ---------- 2

Heiderscheit, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 Or.L.Rev. 57, 72-73 (1989) ---------- 17

Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions", 91 *Harv.L.Rev.* 1033, 1051 (1978) ---------- 18

Modern Drug Encyclopedia, York Medical Books, Technical Publishers, 1981, pp. 744-752 ---------- 2

Physicians Desk Reference, Medical Economics Co., Inc., Oradel, N.J., 44 ed. 1990 ---------- 2

Psychiatric Peer Review, American Psychiatric Association, Washington, D.C. (current ed.) ---------- 2

Restatement (Second) of Judgments §27 cmt. e (1982) ---------- 15

Restatement of Judgments §68 cmt. d, e (1942) ---------- 15

Robert Berkow, M.D. *The Merck Manual* , Merck Research Laboratories, Rahwa, N.J., 1992, Chap. 27, p. 574, ¶ 4 ---------- 2, 3

Wright & Miller *Federal Practice and Procedure:* Civil Sections 2006 and 2284 (West 1970) ---------- 20, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. _____

CONNIE RESHARD *and* LEROY RESHARD,
Co-Personal Representatives of the Estate of MINNIE LEE RESHARD on Behalf of the Estate of and Certain Survivors,

Petitioners,

Versus

DR. EARL BRITT, DR. GEORGE BONK,
DR. DAVID MOORE, DR. PANKAJ CHOKHAWALA,
TALLAHASSEE MEDICAL CENTER, INC.
d.b.a., TALLAHASSEE COMMUNITY HOSPITAL,

Respondents,

Versus

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER,

Defendant.

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

Connie Reshard and Leroy Reshard, Petitioners file this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review the order filed on January 15, 1997, in *Reshard v. Britt, et al.*, No. 92-3470. App. at 3-4. On July 21, 1997, Associate Justice Kennedy granted Petitioners an extension of time until August 27th, in which to file this Petition. Appl. No. A-65, July 21, 1997.

II

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit was issued on January 15, 1997, No. 95-3470 (TJOFLAT, BIRCH and ANDERSON, Circuit Judges). This case was dismissed without a full hearing on the merits. On April 29, 1997, rehearing by the panel and en banc review were denied. __F.[3]2d__ (11th Cir. 1997). App. at 1-2. The panel held that the use of arguments concerning the issue of dismissal of the lawsuit in support of reducing the amount of attorney fees and judicial disqualification of district court judges by Plaintiffs-Appellants, violated their order of November 14, 1996. App. at 5. The Order stated that the arguments regarding dismissal of the lawsuit must be stricken from Appellants brief because the issue had been previously determined in appeal no. 91-3542. *See* app. 10. In the earlier appeal, the Court of Appeals affirmed the dismissal of the case with prejudice for alleged violations of discovery by Plaintiff Connie Reshard, even though the amount of the sanction award of attorneys' fees had not been set. September 30, 1992, No. 92-3542 (TJOFLAT, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges). It is unpublished and produced in the Appendix. App. at 33-35.

The underlying order of sanctions was issued by the district court on May 6, 1991. App. 36-38. The United States District Court for the Northern District of Florida, Tallahassee Division entered an order adopting the Order, Report and Recommendation by Magistrate Judge William Sherrill,[1] dated December 14, 1990.[2] The order imposed the combined sanctions of the dismissal of the action with prejudice, cost and attorneys fees, pursuant to Rules 16(f), 41(b), and 37(b)(2), Fed. R. Civ. P.. based on its findings of discovery violations by Plaintiff Connie Reshard[3], No. 85-7216-ws. (WILLIAM STAFFORD, then-Chief Judge).

---

1 All discovery matters were transferred to the magistrate judge under 28 U.S.C. 636§ *(b)(1)(A)(B)(C)*, codified at Rule 72, *Fed. R. Civ. P.*, a nonconsensual appointment on October 17, 1989. R4-171-1. Rule 72 has been repealed.

2 Plaintiffs filed a timely motion for reconsideration with Magistrate Judge Sherrill, but he refused to act on it before Judge Stafford treated the motion as an appeal. App. 42-43. Plaintiffs argued that its motion was technically a Rule 59 (e) motion for appeal purposes between the magistrate judge and the district court judge.

3 Connie Reshard did not attend a pretrial conference that was scheduled *ex parte*. She attempted to notify the court in writing about a conflict and that counsel for Defendant Moore had mislead the court in requesting the conference by requesting a (continued . . .)

The district court judge remanded the case to the magistrate judge in order to set the amount of attorney fees and costs. The magistrate judge stayed further action on August 8, 1991. R10-422-1. The amount of the award of attorney's fees and costs were fully determined on September 12, 1995. App. at 15. Interim orders affecting the determination of the amount of fees are located in the Appendix. App. at 15-25. Judgment was issued on September 19, 1995. App. at 14. Motions for Reconsideration were denied by the district court. App. at 12-13.

JURISDICTIONAL STATEMENT

This Court's jurisdiction to review the United States Court of Appeals for the Eleventh Circuit Order of January 15, 1997 is invoked pursuant to 28 U.S.C. A. § 1254 (West Supp. 1997).

Section 1291, Title 28 of the United States Code was invoked for jurisdiction before the United States Court of Appeals for the Eleventh Circuit. 28 U.S.C.A. § 1291 (West Supp. 1997).

---

date that she knew Petitioner was unavailable, but the magistrate judge did not receive the next day express mail delivery until the second day. R5-223-1. The other infractions flow from the facts that : (i) Connie Reshard did not attend the depositions of Plaintiffs' expert witnesses, Dr. Reginald Peniston and Dr. Robert Taylor, because she believed that it was not required under the circumstances and the federal rules because, among other things, defense counsel did not sign the applicable pleading under Rules 11 and 26(g) (currently an excuse under Rule 26(g)(2)(C)); (ii) one expert, Dr. Robert Taylor attended the deposition and was deposed by each counsel representing the five Defendants (He recanted his statements previously made to Connie Reshard, leading to discrepancies in her answers to interrogatories and in the answers to questions put to her by Magistrate Judge Sherrill in open court and by defense counsel during her deposition.); and (iii) Dr. Peniston had discussions with defense counsel by teleconference, but did not attend the deposition at the scheduled time. The Reshard deposition was filed and used in the district court over her objections that it had not been submitted for review under Rules 30 (e) and 32 (b) and (e) . Fed. R. Civ. P. App. 95-97. The district court refused to extend the work-product privilege to Petitioner Connie Reshard, either before or after she became a lawyer on November 18, 1987. R4-184-2. The *Hickman, infra section II (b)(1)* court left the issue open. The circuits are divided on the issue. *Alltmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (extended privilege); *Southern Ry v. Campbell*, 309 F.2d 569 (5th Cir. 1962) (did not extend privilege).

UNITED STATES CONSTITUTIONAL PROVISIONS

ARTICLE III READS:

Section 1. The judicial power of the United States, shall be invested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts, shall hold their offices during good behaviour . . .

Section 2. The judicial power shall extend to all cases, in law and equity arising under this Constitution, the laws of the United States . . . or which shall be made, under their authority. . . to controversies . . . between citizens of different states . . . .

AMENDMENT V READS:

No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

AMENDMENT XIV READS:

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

A. Statement Of Facts.

This is a wrongful death case under a theory of medical malpractice. It was filed on July 29, 1985, in the United States District Court for the Northern District of Florida, Tallahassee Division, under the diversity of citizenship, subject matter jurisdiction, pursuant to section 1332, Title 28 of the United States Code. R1-1-2.[4] The Plaintiffs are the personal representatives of the estate of the decedent and the children of the decedent.

Florida Wrongful Death Statute, Fla. Stat. § 768 *et seq.*, authorizes compensatory and punitive damages on behalf of the estate and certain survivors. App. at 121. Plaintiffs complied with the provisions and stated that the gross and wilful negligence of the Defendants was the cause of the death of Minnie Lee Reshard, the decedent. The Defendants are Dr. Earl Britt, Dr. George Bonk, Dr. Pankaj Chokhawala, Dr. David Moore, Tallahassee Medical Center, Inc. d.b.a., Tallahassee Community Hospital (Hereinafter "TCH"),[5] and Tallahassee Memorial Regional Medical Center (Hereinafter "TMRMC"). TMRMC was dismissed as a party on January 30, 1986; the court held that it was not the proximate cause of the decedent's death. R1-47-5.

About 4 a.m. on August 2, 1983, decedent, a 57 year old African-American woman, was awaken with severe pain in the upper chest, which spread to her arms and legs. She was taken to TCH but did not see a doctor for more than 4 hours. The decedent was admitted as a patient. She was found dead on August 6, 1983. According to the State of Florida medical examiner, Dr. Jerry Harris, she died of the rupture of a dissecting aneurysm of the aorta, when blood flowed into the pericardium, causing cardiac tamponade and subsequent death. The aneurysm was confined to the ascending aorta.

Dr. Britt, Dr. Bonk and Dr. Chokhawala failed to diagnose the acute dissection of the aneurysm. Although the decedent had a clinical

---

4 The Eleventh Circuit reviews cases on the original record and the citations so noted apply herein to all district court entries. (R volume - doc. - page number). Transcripts are identified as R volume - page number.

5 TCH is a partially owned subsidiary of the Hospital Corporation of America, now Columbia/HCA.

history of hypertension since 1969, this medical information was ignored and she was primarily treated for depression.[6] Dr. Chokhawala gave her an antidepressant drug, desyrel. It exacerbated the dissection, leading to death. Since 1980, Dr. Moore had prescribed two powerful antidepressants, prolixin and pamelor for pain associated with a physical injury, fully aware of her clinical hypertension.[7] Both drugs lead to unstable management of hypertension, the cause of the weakening of the aortic wall, leading to the aneurysm and dissection thereof. R9-341-3-7.[8]

With proper diagnosis and surgery the decedent's chance of survival was 70 percent.[9] Without surgery, rupture leads to death 90-95 percent of untreated patients. R7-281; R9-347; R8-321. A dissecting aneurysm is detectable on plain chest x-rays, 95 percent of the time.[10]

---

[6] The decedent had been under the care of Dr. Britt since 1978. He was treating her for hypertension—160 mg of Inderal per day was being administered routinely and the dosage continued during her hospital stay until her death. A baseline chest x-ray taken at TMRMC in February 1979 shows that the decedent had a normal size heart and silhouette. R2-75. (Medical records obtained from Dr. Britt and TMRMC).

[7] According to the radiologist, Dr. Michael Childress, retained by the Plaintiffs in July 1986, if needed—"The cardiac and aortic changes are suggestive of systemic hypertension . . . The appearance of the aorta is consistent with and suggestive of aortic dissection, especially chronic . . . ." (chest X-rays taken on August 2, 1983). R9-347-4.

[8] In documents obtained from the Food & Drug Administration in 1986, prolixin and pamelor have been linked to unstable blood pressure management. R9-341-3-7; *see also Modern Drug Encyclopedia*, York Medical Books, Technical Publishers, 1981, pp. 744-752; *Physicians Desk Reference*, Medical Economics Co., Inc., Oradel, N.J., 44 ed. 1990, Gordy & Gray, *Attorney's Textbook of Medicine*, Vol. 3A, 3rd ed., M. Binder (1973) ¶ 76.11; *Diagnostic 7 Statistical Manual of Mental Disorders* (DSM-111-R), 3rd ed. American Psychiatric Association, Washington, D.C., 1987; *Psychiatric Peer Review*, American Psychiatric Association, Washington, D.C. (current ed.).

[9] "The surgical mortality in major medical centers with an interest in aortic dissection is now about 15% for proximal aortic dissections and somewhat higher for those of the distal aorta." Robert Berkow, M.D. *The Merck Manual* , Merck Research Laboratories, Rahwa, N.J., 1992, Chap. 27, p. 574, ¶ 4. TCH was not equipped to handle the surgery and the patient should have been transferred to TMRMC.

[10] "I was shown a chest x-ray [of the decedent] and asked if I thought it was normal. I replied that it did not look normal to me and further that if the patient had chest pains, that further testing was required . . . I showed the x-ray[s] to two separate radiologists with the statement that this was a patient with chest pains. **Both** radiologists found the x-rays worrisome and abnormal regarding the aortic silhouette (continued . . .)

Id.; *The Merck Manual*, P. 573, ¶ 4. Respondent doctors stated that her chest x-rays were normal.

On August 7, 1983, Dr. Jerry Harris was supposed to perform an autopsy, **solely** for the purpose of determining the cause of death of the decedent.[11] Dr. Britt, Dr. Harris, TCH and others criminally conspired to remove the heart and aorta without an authorization to do so from the decedent's family. The written autopsy report was then falsified in a material manner in order to support a false contention that the damage was so massive, successful surgical intervention would have been remote or futile. R7-281-exht. K.

The mortician advised the decedent's family that the heart and aorta had been removed. App. at 133, ¶ D; App. at 137-38, ¶ 4. No written documentation of the removal of the organ is contained in the written autopsy report or any medical records obtained during discovery by Petitioners. Finally under threat of a second subpoena in July 1990 (The first was interrupted in 1986 when Plaintiffs were disqualified from proceeding *pro se*.), Dr. Harris acknowledge to the Plaintiffs that he had given TCH the heart and aorta and all other evidence created as a result of the autopsy in July 1990. TCH had repeatedly falsified its discovery responses to Petitioners by failing to acknowledge and give to Petitioners, the evidence in its custody. App. at 126-27. TCH's counsel, William Davis subsequently acknowledged that this material organ evidence was in its possession: On behalf of all Defendants, he stated in Footnote 10: "[t]he Petitioners never sought production, from any

---

and freely offered the possibility of aortic dissection . . . The chance of survival would have been about seventy (70) percent . . .Since the patient had recurrent chest pains while hospitalized and since the physicians were convinced that she had a neuropsychiatric problem they did not even entertain the diagnosis of dissecting aneurysm . . . ." Dr. Reginald Peniston, Thoracic surgeon retained by Plaintiffs in July 1986. R9-347-1-3.

[11] Dr. Britt was present during the performance of the autopsy. Dr. Harris, Dr. Britt and two TCH representatives met with Petitioners (who were waiting in an adjacent room while the autopsy was being conducted) in order to explain the autopsy results. The mortician took the body while we were in the meeting. No one told Petitioners that organs had been removed from the decedent. They explained that she had died from the rupture of an aneurysm located in the aorta, just an inch above the heart and that the dissection (splitting of the intimal wall) was confined to a small localized area in the ascending aorta. Dr. Britt stated that nothing could have been done to save her life. App. at 130-135. (Leroy Reshard Aff.).

Respondent, of their decedent's heart; let alone did they ever move to compel its production." ***Respondents' Joint Brief, Petition for Writ of Certiorari, Reshard v. Britt, et al., Case No. 92-1549, at 23, n. 10.***

B. COURSE OF PROCEEDINGS.[12]

After the May 6, 1991 Order, authorizing the combined sanction of dismissal of the lawsuit, costs, and attorney fees to the Defendants, Plaintiffs filed a Motion to Disqualify the magistrate judge and the district judge on May 28, 1991. R10-404. Then-Chief Judge Stafford denied the motion with respect to himself on June 3, 1991. App. at 41, n. 3. Plaintiffs filed a notice of appeal on June 4, 1991.

The **second appeal** involved the order granting the sanction of dismissal, attorney fees and cost although the amount of attorneys fees had not been set, Appeal No. 91-3542, June 4, 1991. Petitioners argued among other things, that no final order was before the Court of Appeals. An unpublished order affirming the sanctions was issued by the Court of Appeals on September 30, 1992. (No. 91-3542). (Tjoflat, Chief Judge and Hatchett and Kravitich, Circuit Judges). App. at 33-34. Reconsideration of the Order and Suggestion of En Banc Hearing was denied on December 21, 1992. Petitioners sought a writ of certiorari on March 21, 1993, No. 92-1349. It was denied on June 17, 1993. ____U.S. ____. A rehearing was denied on August 18, 1993.

Magistrate Judge Sherrill reactivated the case on April 19, 1993 by denying the Motion to Disqualify with respect to himself. App. at 31. On July 27, 1993, the magistrate judge issued an order setting the dollar amounts of attorney fees and cost. App. at 26-30. The district judge adopted, in part, and remanded the remaining issues to be reset in conformity with his order. App. at 22-25. On January 25, 1995, the magistrate reissued a modified order, setting attorneys fees and costs. Petitioners filed timely objections. The dollar amounts were fully set for cost and attorney fees, on September 12, 1995 when the district judge

---

[12] The **first appeal** in 1986 involved the disqualification of Plaintiffs from proceeding *pro se*. R3-146. *Reshard v. Britt*, 819 F.2d 1573 (11th Cir. 1987), *rev'd., vacated*, 831 F.2d 222 (11th Cir. 1987), *aff'd. on other grounds*, 839 F.2d 1499 (11th Cir. 1988) (en banc) (court evenly divided). Before the first appeal various disputes arose between the parties, in part, involving disclosure of discovery matters and the disqualification of William Davis for attorney-client communications between Connie and Lloyd Reshard and Davis and his firm.

adopted the order. App. at 15. The final awards were: Respondent Chokhawala – $8,249.65; Respondent Moore – $8,113.50; Respondent TCH for appeal – $21,786.00;[13] Respondent Britt – $11,907.59; Respondent Bonk – $4,770.65; and Respondent TCH district court – $18,493.66. Judgment was entered on September 19, 1995. App. at 14. Motions for Reconsideration were denied by then-Chief Judge Stafford on October 24, 1995, R12 - 485, and on November 28, 1995. R12 - 491.

The third appeal was filed on October 11, 1995. R12-48. (Appeal No. 95-3470). On March 15, 1996, TCH filed a Motion to Dismiss for Failure to Prosecute. It claimed that Petitioners had failed to file a Civil Appeal Statement Form under 11th Cir. R. 33-1(a)(1) and (b)(1) and an Appeal Information Sheet, and it claimed that the issues raised by Petitioners in the Notice of Appeal had already been litigated in Appeal No. 91-3542.

The Panel of Edmondson, Barkett and Anderson requested in an April 1, 1996 letter that Petitioners file the above referenced forms for review along with the Motion to Dismiss. App. at 6. Appellants filed those forms. The Civil Appeal Statement identified the issues presented for review, encompassing the issues of dismissal and attorney fees. App. at 7. TCH filed an objection to the scope of issues identified in the Civil Appeal Statement. Petitioners filed a response to this objection, citing the lack of jurisdiction in Appeal No. 91-3542 and the taking of the decedent's heart by TCH under the property rights bestowed Appellants under the 5th Amendment.

On June 26, 1996, the Court of Appeals denied TCH's Motion to Dismiss, without making any changes in the scope of issues contained in the Civil Appeal Statement, i.e., it included the review dating back to the May 6, 1991 order of the sanction of dismissal, costs and attorney fees. App. at 9.

Respondent TCH subsequently filed a Motion to Strike Petitioners Response to its Objection to the Civil Appeal Statement. It was granted on August 19, 1996 by then-Circuit Judge Joseph Hatchett. App. at 11. Petitioners filed their brief on August 7, 1996,

---

[13] In the **second appeal**, *infra*, the panel awarded attorney fees after Petitioners filed the first *writ of certiorari* in 1993, stating that the appeal was meritless. It authorized the district court to set the amount.

encompassing the entire May 6, 1991 order of sanctions. Thereafter, TCH filed a **series** of Motions to Strike and Renewed Motions to Dismiss, adopted by the other parties. On September 25, 1996, Circuit Judge Dubina granted the Motion to Strike all references of issues previously presented in Appeal No. 91-3542, without being specific or setting a due date. App. at 10. Petitioners filed a Motion to Vacate, Expedite and in the Alternative, Reconsideration on September 30, 1996. Petitioners sought to vacate the September 25 Order because a single judge may not determine the scope of an appeal, Rule 27 (c), Fed. R. App. P. and 11th Cir. R. 27 (d). Petitioners sought to vacate the August 19 Order striking its Response to TCH's Objection to the Civil Appeal Statement. They cited the lack of subject-matter jurisdiction, the inapplicable use of collateral estoppel and res judicata devices and the disqualification of Chief Judge Hatchett. On November 14, 1996, the Clerk of Court advised the parties that Chief Judge Hatchett recused himself.[14] The Court denied Appellants Motions to Vacate on November 14, 1996.

Petitioners, pursuant to 11th Cir. Rule 27(f)[15], filed a Motion, asking the merits panel to vacate both the August 19, 1995 Order to Strike, the September 25, 1996 Order to Strike portions of Petitioners' brief, and the Orders denying Petitioners Motion to Vacate those orders.

Petitioners filed a corrected brief on November 27, 1996, now limited to three issues: the disqualification of the district court judges, encompassing all reasons it believed supported bias and prejudice (the sanction of dismissal as a sub-issue); the amount of attorney fees, subject to adjustment based on the elements of the case (a permitted area under lodestar); and the striking of ***ex parte*** matters[16], regarding a

---

[14] Chief Judge Hatchett recused himself only after Petitioners raised the issue that he was the neighbor and personal friend of Defendant Britt, beginning as early as 1983. "[F]urther, be advised that the appellants' "motion for recusal" is moot in light of Chief Judge Hatchett's recusal." Memorandum to Parties from the Clerk of Court, November 14, 1996.

[15] Eleventh Cir. Rule 27 (f) states: "A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the case is assigned on the merits, and the merits panel may alter, amend, or vacate it."

[16] *Ex parte* issues involving transcript tampering and judicial disqualification all involving the U. S. Government, not a party in this case, has been filed in this case by TCH, at both the district court and court of appeals level. *Infra at n. 32.*

motion to disqualify a judge in another case and the issue of transcript tampering, both in other cases not before the Court of Appeals.

On December 5, 1996, Petitioners filed several motions: Motion to Clarify, directed to Circuit Judges Edmondson, Barkett and Anderson, regarding their Order of June 26, 1996; Motion to Vacate Appeal No. 91-3542 for lack of jurisdiction and because both Then-Chief Judge Tjoflat (Jacksonville) and Then-Circuit Judge Hatchett (formerly of Jacksonville, now Tallahassee) should have disqualified themselves because of their friendship with the district court judges, Hatchett's relationship of friendship and neighbor with party-Defendant Britt; and Motion for Vacation by Merits Panel Under Rule 27 (f).[17]

On December 4, 1996, TCH, later joined by Respondent Britt, suggested that the Clerk dismiss the case. On January 15, 1997, the panel of Circuit Judges Tjoflat, Anderson and Birch denied all Motions filed by Petitioners and granted dismissal of the appeal by construing the suggestion to the clerk of court as a motion to dismiss.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court should grant a *writ of certiorari* in this case in order to preserve the principle that courts of appeal may only rule on final decisions under section 1291. At issue is a district court order authorizing the combined sanctions of dismissal of the lawsuit, attorneys' fees and costs. The amount of fees and costs were remanded to a magistrate judge to determine the dollar amount. Before the dollar amounts were set, the Court of Appeals affirmed all three sanctions. In a second appeal, after the dollar amounts had been set, the Court of Appeals refused to allow current jurisdiction regarding the issue of dismissal as a sanction or as an argument for any purpose including an argument in support of a reduction in the amount of attorney fees. The

---

[17] In recent Congressional hearings, both judges discussed their long association beginning in Jacksonville in the Northern District of Florida, to their current association as members of the Court of Appeals. They freely discussed their influence in the area of consensus building on the Court of Appeals, and acknowledged that some legal scholars have criticized the process. Together, they represent the current-and immediate ex- Chief Judge for the Eleventh Circuit, a relevant position for "consensus building." Only in this instance, they went too far. Hearings Before the Senate Judiciary Committee, Sub-Committee on the Administrative Oversight and the Courts, 105 Cong., 1st Sess. (June 9, 1997).

current appeal was dismissed when Petitioners, under the belief that the prohibited issue was permissible as a sub-issue, included the issue of dismissal in support of a reduction in the amount of attorney fees and in support of the disqualification of the district court judges, both of which, current jurisdiction was not in issue.

By dismissing the current appeal, the Eleventh Circuit has failed to follow Supreme Court precedents or its own precedent, in determining finality under section 1291. This Court has defined certain circumstances under which attorney fees can be treated as a collateral issue to the litigation and, by implication, those circumstances in which attorney fees are treated as an integral component of the litigation. When the award of fees is collateral, an order adjudicating the merits of the lawsuits is final irrespective of whether the amount of the award has been set. *Bundinich v. Becton Dickinson and* Co., 486 U.S. 196, 199, 108 S.Ct. 1717 (1988), *citing Catlin v. United States,* 324 U.S. 229, 233 (1945). In *Bundinch,* this Court held that attorney fees awarded under statute to a litigant who has successfully litigated the lawsuit is a collateral issue, separate from the litigation on the merits. Finality attaches to the order adjudicating the merits even if the amount of attorney fees has not been set. Finality, however, does not attach until the fee amount has been set, if the award of fees is an integral component of the litigation. *See, White v. New Hampshire Dep't of Employment Security.,* 455 U.S. 445, 452, 102 S.Ct. 1162, 71 L.Ed.2 325 (1982); *United States v. F & M. Schaeffer Brewing Co.,* 356 U.S. 227 (1958). The rule in this Court and the Circuits governing the award of attorney fees has consistently tracked the rule that the determination of monetary damages is an integral component of the litigation, *i.e.,* liability on the merits before the amount of damages has been reduced to a dollar amount is not final under section 1291. *Id.* The Circuits have consistently distinguished the award of attorney fees as a collateral element in the litigation and those fee awards considered to be integral to the litigation, administer under rules of equity.

The removal of the underlying order of sanctions forecloses Petitioners from fully litigating that issue and the issues regarding the amount of attorney fees and the disqualification of the district court judges. In doing so, the result is piece-meal administration of the case and the infringement on due process of law for Petitioners. Therefore, the Court of Appeals erred as a matter of law by excluding the issue of

dismissal generally and as an element in the determination of the amount of attorneys fees and in the issue of judicial disqualification. The district court judges demonstrated bias and prejudice in favor of the Defendants throughout the case. In addition to intra-judicial decisions, the district court made statements in support of its local bias. *Infra*, § III(B)(2).

With respect to the merits of the issue of sanctions, the application of sanctions is inconsistent with due process of law and equal protection of the law clauses. The imposition of sanctions on Petitioners is unjust and inconsistent with precedents set by this Court. *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2132 (1991); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990); *Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee*, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982) (punitive dismissal of a lawsuit must be just). So far, the Respondents have destroyed documents, withheld material evidence and given false and incomplete answers to interrogatories, without being sanctioned. The heart and aorta, material evidence in the case and the constitutionally protected property of the Petitioners was and is in the custody and control of Respondent TCH. *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), *see also, Whaley v. Tuscola County*, 58 F.3d 1111 (6th Cir. 1995). TCH has not been required to return the organs to Petitioners, did not make the evidence available to Petitioners or even acknowledge in any discovery materials its possession of this evidence. The sanctions in this case cannot be said to be just under these circumstances or under federal law.

Further, the Eleventh Circuit failed to follow its precedent with respect to the application of sanctions under the Federal Rules of Civil Procedure. Their conduct is inconsistent with the spirit and intent of sanctions as an equitable remedy. *World Thrust Films, Inc. v. Int'l. Family Intertainment, Inc.*, 41 F.3d 1454 (11th Cir. 1995); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc). Its evaluation of this case also conflicts with the Second, Third, Six, Eight, Ninth, and D.C. Circuits, all of whom are applying substantially different guidelines for discovery sanctions. This situation leads to an uneven resolution of property rights and unjust decisions for litigants.

Disputes arising in the area of discovery and pretrial case management is the most important stage of litigation and the most

promising stage for settlement resolution, provided that dispute resolutions at this juncture are enforced fairly between the parties. The behavior of the Eleventh Circuit is not only repugnant to the U.S. Constitution, it violates the spirit of the December 31, 1993 amendments to the Federal Rules of Civil Procedure, in general, and specifically to the discovery rules, an explicit theme of full disclosure by both parties in the federal courts.

I. WHETHER THE COMBINED SANCTIONS OF DISMISSAL, ATTORNEYS FEES AND COSTS LACKED FINALITY BEFORE THE AMOUNT OF FEES WERE SET.

A. Dismissal Of Current Appeal Was Err Since The Second Appeal, No. 92-3542 Lacked Finality.

The Court of Appeals may only rule on final decisions under section 1291.[18] "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); *see also Bundinich v. Becton Dickinson and* Co., 486 U.S. 196, 199, *citing Catlin v. United States*, 324 U.S. 229, 233 (1945). Here the dollar amount of attorney fees had not been set and the case was remanded to the magistrate judge. In *Bundinich*, this Court held only that the statutory authorization of attorney fees is collateral to the merits of a case. *Id.*; *see also, White v. New Hampshire Dep't of Employment Security., 455 U.S. 445, 452, 102 S.Ct. 1162; United States v. F & M. Schaeffer Brewing Co., 356 U.S.* 227. No authority exist in the federal courts or the Eleventh Circuit, authorizing finality of an unfinished fee award.

This Court has not explicitly decided the issue of whether the award of attorney fees is a collateral or an integral component in the litigation when the award is a sanction. Because the award of attorney fees is itself a part of a total package of sanctions, the case is stronger than those already litigated on the issue, *infra below*, that it is an integral

---

[18] The rule in all federal courts is that a judgment must be vacated when there is a lack of subject matter jurisdiction. *See e.g., Caterpillar, Inc. v. Lewis*, __ U.S. __, 65 U.S.L.W. 4021 (12/10/96) (lack of jurisdiction in a district court removal case cured before judgment). Here, the finality issue was not cured until September 12, 1995.

component of the litigation and cannot be severed from the underlying order of May 6, 1991. We, therefore, assert that the lack of an amount of attorney fees at the time of the second appeal deprived the Court of Appeals of finality because attorneys fees as a sanction was combined with the dismissal of the lawsuit as a sanction, making them an integral component of the litigation. The litigation did not end on May 6, 1991; it ended on September 12, 1995, when the amount of the attorneys fee awards had been fully set for each Defendant.

Indeed, no court of appeals including the Eleventh Circuit[19] has interpreted *Bundinich* as a bar to the lack of finality when attorney fees are awarded as a component of a sanction, but not yet set in dollars and cents or failed to recognize that only statutory fee awards are collateral issues to dismissal of a lawsuit with prejudice.[20] Even where exceptions to the finality rule have occurred, it has not covered a sanction of dismissal and attorney fees, but involved only cases where attorney fees were authorized by statute as a separate item from the order of judgment on the merits, an award for successfully litigating the case.[21]

---

[19] *Shannon v. Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995) (Tjoflat, Cox and Dyer Circuit Judges)

[20] *Buchanan v. United States*, Nos. 95-3057 and 95-3145, slip op. (7th Cir. 8/2/96); *Discon Inc. v. NYNEX Corp.*, 4 F.3d 130, 132 (2d Cir. 1993); *Cooper v. Salomon Brothers, Inc.*, 1 F.3d 82 (2d Cir. 1993); *Southern Travel Club v. Carnival Airbus*, 986 F.2d 125 (5th Cir. 1993); *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064 (7th Cir. 1993); *Jones v. Jones (In re Jones)*, 9 F.3d 878, 879 n.2 (10th Cir. 1993) (setting the amount of claim must be done before finality); *Ierna v. Arthur Murray Intern., Inc.*, 833 F.2d 1472, (11th Cir. 1987); *Jaffee v. Sundowner Properties, Inc.*, 808 F.2d 1425, 1427 (11th Cir. 1987).

[21] *Bundinich v. Becton Dickinson and* Co., 486 U.S. 196, 108 S.Ct. 1717; *Gilda Marx, Inc. v. Wildwood Exercise*, Inc., 85 F.3d. 675 (D.C.Cir. 1996) (judgment on the merits, no sanction, attorney fees under statute); *Andrews v. Employees' Retirement Plan*, 938 F.2d 1245 (11th Cir. 1991) (Circuit recognized an exception to general rule that no final order exist, except in statutory attorney fee awards); *John v Barron*, 897 F.2d 1387 (7th Cir. 1990) (separate order of dismissal on the merits and a Rule 11, Fed. R. Civ. P. order of sanctions, sanction order not final); *Turnbull v. Wilcken*, 893 F.2d. 256 (10th Cir. 1990) (three separate orders involved, including a separate order of sanctions under *Rule 11* which was excluded from the appeal); *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990) (default judgment, no sanction and appeal under Federal Arbitration Act); *Cleveland v. Berkson*, 878 F.2d. 1034 (7th Cir. 1989)(dismissal under *Rule 12(b), Fed. R .Civ. P.*, separate order of Rule 11 sanctions); *Taylor v. Texgas Corp.*, 831 F.2d 255, 257 (11th Cir. 1987); *Vames v. Local 91, Glass Bottle* (continued . . .)

In *Izumi Seimitsu v. U.S. Philips Corp.*, 114 S.Ct. 425, 428 (1993), *citing Lake Country Estates, Inc. v. Tahoe Planning Agency*, 440 U.S. 391, 398, 99 S.Ct. 1171, 1175 (1979), this Court stated that it is the primary responsibility of each court to first determine appellate jurisdiction. The Court stated: "We must also notice the possible absence of jurisdiction because we are obligated to do so even when the issue is not raised by a party." *Id.* The panel in the second appeal erred at law when it did not dismiss the appeal for lack of finality. It should not be allowed to bar Petitioners from actually litigating the entire order of sanctions, encompassing all orders from May 6, 1991 through September 19, 1995.

Here the panel in the second appeal treated Petitioners differently from other litigants. It did not follow precedent established in the Eleventh Circuit. Only a Court of Appeals sitting en banc may overrule existing precedent. *See e.g. United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995) The problem here is exacerbated by the fact that the decision in the second appeal was not published, so it only affected Petitioners. Due process of law under the 5th Amendment as well as rules governing judicial precedent guarantees equal protection under the law. Petitioners were deprived of their constitutional rights in both areas.

Equally as important is that this case has been managed on a piece-meal basis. The bifurcation of the sanction of dismissal and the sanction of the award of attorney fees has created a procedural nightmare and an unlawful disposition of the case. The issue of judicial disqualification *infra*, § II, a basis for nullifying the sanctions, under this approach, is impaired. A motion to strike should not handle the determination of issues on appeal. This entire process not only violates the litigant's due process of law, it is a less than optimal administration of justice, leading to uneven results for the litigants involved. Under these facts, this Court should preserve efficient and fair judicial administration by reviewing this case in its entirety.

Blowers Ass'n., 674 F.2d 1365, 1368-91 (11th Cir. 1982) (equitable award of attorney fee award is not collateral.).

B. Local Bias Violates Article III of The U.S. Constitution And Contributed To the Perpetuation Of The Lack Of Finality Issue.

The initial panel of circuit judges in the second appeal has close affiliation with the Northern District of Florida that may well have played a role in its declaration that the May 6, 1991 order was a final order.[22] The appearance of impropriety by close and local friends at the appellate and district court levels should be a basis for the disqualification of federal judges under Art. III, § 2.[23] When issues of serious misconduct are raised in a district court where two of the Court of Appeals panel members deciding the case reside in and are friends of the district court judges as well, the appearance of impropriety and spirit of subject matter jurisdiction favors disqualification of the circuit judges. Both Circuit Judge Tjoflat and Chief Judge Hatchett have been affiliated with the Northern District of Florida for many decades. Circuit Judge Tjoflat was a district judge and Chief Judge Hatchett worked with him as a magistrate judge before they were appointed to the Court of Appeals. Chief Judge Hatchett, in addition to his local judicial association, is a friend and neighbor of Defendant Britt. He should have recused himself from this case more than ten years ago in the 1986 appeal. U.S. Const. art. III, § 1 requires "good behaviour" of all judges.

The framers of the constitution were concerned that unfairness could be the outcome when out-of-state litigants faced local judges in state court. U.S. Const. art. III, § 2. This concern was first codified in the First Judiciary Act of 1789, as the diversity of citizenship jurisdiction. The spirit and letter of 28 U.S.C. § 1332 is a means of securing a fair trial in federal court for out-of-state litigants. But this problem is not limited to state judges and applies to federal judges in the modern

---

22 Given the nature of the issues involved and the special role a chief judge plays in the administration of the procedures for judicial assignment under Eleventh Circuit Rules 27(f) and 34 and Internal Operating Procedures (IOP), the process must be carefully adhered to in all cases by all parties concerned. Petitioners are not privy to case assignment and cannot confirm that the Panel in the second appeal was selected on a purely random basis, as is required by Eleventh Circuit Rules.

23 *United States* v. Tucker, et al., No. 95-3268, slip op. (8th Cir. 3/15/96) (disqualified district judge, a friend of President Clinton during certain Whitewater litigation even though the President was not a party to the litigation.)

United States where technology, transportation and the process by which judges are appointed can lead to the same concerns regarding local bias for out-of-state litigants in federal court, that the framers feared more than 200 years ago. Petitioners assert that this is an independent basis for nullification of the second appeal or at least in conjunction with the lack of finality is a basis for granting a *writ of certiorari* in this case.

1. The Appearance Of Impropriety Is Sufficient Basis For Disqualification And Vacation Of Appeal No. 91-3542.

All judges must demonstrate fairness in the administration of justice. The underlying basis of the judicial disqualification statutes, *i.e*, 28 U.S.C. §§ 144, 372 and 455,[24] is a fundamental right to due process of law and equal protection of the law. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 624-627, 99 L.Ed. 767 (1955). Any judgment can be vacated when it is obtained by a court that is biased and prejudiced against one party in favor of the other party, **even for harmless error**. *See, Anderson v. Sheppard*, 856 F.2d 741, 746-747 (6th Cir. 1988).

Additional support is found under section 455 (a) of title 28 of the United States Code. It requires that all judges review their conduct in an effort to avoid even the appearance of bias and prejudice. The appeal in issue was presented under a cloud of misconduct involving (i) bias and prejudice by the district court judges; (ii) the modification of the record on two occasions by Court Reporter Paul Rayborn (September 3, 1986 and June 29, 1990 in violation of section 753 of Title 28 of the United States Code) App. at 35;[25] and (iii) concealment and destruction of evidence by Defendants but ignored by the district court judges. *Discussed infra*. Under the circumstances presented, the Eleventh Circuit erred as a matter of law in the second appeal and in the current appeal.

When the appearance of fair judgment is called into question, disqualification is appropriate. *Liteky, et al. v. United States*, 510 U.S.

---

[24] Section 455(a) is a self executing provision, imposed upon each and every federal judge and magistrate judge by statute and does not require that a party specifically raise the provision in the district court. *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980).

[25] The motion to settle the record was remanded to the district court by Senior Circuit Judge Fay and Petitioners argued for review by a panel because of bias in the district court. The merit panel denied the motion.

540, 114 S.Ct. 1147, 1155 (1994); *United States v. Microsoft Corp., 56 F.3d 1448,1463,* 312 U.S.App.DC 378, 393 (D.C. Cir. 1995) (disqualified district judge for appearance of impropriety because he allowed *ex parte* matters to be filed). The appearance of judicial bias by two panel members is sufficient reason for their disqualification and the vacation of the decision in appeal two, No. 91-3542.

2. Only The Court Sitting En Banc Should Have Decided Whether To Vacate The Second Appeal.

Only the full Court of Appeals can effectively remove any appearance of impropriety in this case. The Eleventh Circuit's failure to do so is reversible error. *See e.g. United States v. Camper*, 66 F.3d 229, 232. The procedures followed also violated judicial precedent, not only with regard to the finality issue in appeal two, but with respect to the Circuit's local rules. An initial motions' panel of Barkett, Edmondson and Anderson decided to allow the issue of dismissal to be presented to the merits panel for final determination. App. at 9. The subsequent orders by individual Circuit Judges, Hatchett and Dubina and by the motions' panel issuing the order of dismissal conflict with the Edmondson motions' panel decision. This is a direct violation of 11th Cir. Rule 27 (f). *Supra* at n. 15. Therefore, no binding order was issued by the Court of Appeals.

C. Collateral Estoppel And Res Judicata Are Not A Bar.

Because the issue of the dismissal of the case on the merits as a sanction was not a final order, the principles of collateral estoppel and *res judicata* are not a bar to appellate review in the current appeal. "The doctrine of collateral estoppel, also called issue preclusion, bars parties to a prior lawsuit from re-litigating any issues that were actually and necessarily determined by a court of competent jurisdiction in the prior suit." *Arkla, Inc. v. United States*, 37 F.3d. 621, 623 (Fed. Cir. 1994), *citing Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 649 n.5 (1979). Issues presented must have been litigated and they were not. By definition, collateral estoppel can not be a bar when dismissal is obtained as a sanction, because no litigation occurred. Restatement (Second) of Judgments *§27 cmt. e (1982); Restatement of Judgments §68* cmt. d, e (1942). Resolution of the issues were not essential for final judgment because no final order was before the court.

Supra. Most important, there was no full and fair opportunity to litigate the issues in the district court or the Court of Appeals. **On July 31, 1990, just prior to appeal two, the district court stayed all discovery and never removed the stay.** R7-276.

To impose collateral estoppel, four elements must be present: (1) identical issue; (2) issue actually litigated in first action; (3) resolution of the issue was essential to a final judgment in first action; and, (4) the full and fair opportunity to litigate the issue in the first action. *Ankla, Inc. v. U.S.*, 37 F.3d. at 627. The issues are not identical, *e.g.*, the decedent's heart and aorta are in the hands of the Defendants by fraudulent means, who also lied about the organs, contrary to the property interest rights of Petitioners guaranteed by the 5th Amendment, an issue not dealt with by the district court or the Court of Appeals; the disqualification of the district court judges was not final before April 19, 1993, and the order of sanctions was not final until the amount of attorney fees were set on September 12, 1995.

The operative words are" actually" and "competent jurisdiction." Neither word in the context of this case were realized. In this case, *res judicata* can be set aside for **disqualification of a judge, new evidence** (Rule 60(b), Fed. R. Civ. P., admission by Defendants regarding decedent's heart and aorta (*op. cit.*), **change in the law** (all of the revised discovery rules, Rules 26-37, Fed. R. Civ. P. applied to existing cases since March 31, 1994, would condemn Defendants for nondisclosure and fraud; and new case law: *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 113 S.Ct. 2167 (1993)(correction of the record); *Liteky, et al. v. United States*, 114 S.Ct. 1147 (disqualification of judge and exception to the intra-case issue exception explained) and **fraud**, all of which are present here. Controlling facts and the law have changed since the appeal of 91-3542. *Ankla, Inc. v. U.S.*, 37 F.3d. at 627.

The following comments support Petitioners contentions:

> "I write separately to note that, because of the procedure used by the Court of Appeals, the members of the class will not be precluded by the Court of Appeals's judgment from bringing another action in the District Court raising the same constitutional challenge presented in this case, if they so desire. To begin with, it is clear that the Court of Appeals acted in this case without subject-matter jurisdiction . The only arguable basis for jurisdiction over the appeal

> from the District Court's interlocutory order at issue here was *28 U.S.C. § 1292(a)(1)*. However, under a long line of authority the underlying discovery order of the District Court was not appealable as an injunction, because it did not provide " 'some or all of the substantive relief sought by [the] complaint' citation omitted More important, petitioners were not provided the "full and fair opportunity to litigate" the case below that is a prerequisite to application of principles of *res judicata*. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); accord, *Blonder-Tongue Laboratories, Inc. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971). (In this regard, I hardly need observe that the Court's action on the petition for certiorari today does not act as a disposition on the merits.)

(J. Souter, dissenting opinion, joined by Justice Blackmun), *Poyner v. Murray*, 113 S.Ct. 2397, 2398-2399 (1993)(denial of writ of certiorari)

II. WHETHER ORDER OF DISMISSAL VIOLATED DUE PROCESS OF LAW AND FEDERAL STATUTES, IN PART, BECAUSE THE REMOVAL OF THE DECEDENTS HEART AND AORTA VIOLATED THE CONSTITUTIONAL GUARANTEED PROPERTY INTERESTS OF PLAINTIFFS.

There is a failure of due process of law under the Fifth and Fourteenth Amendments in this case. Before dismissing a case, a court must demonstrate substantive and procedural due process of law. *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 784 (1971). "It is courts . . . that we ultimately look to for the implementation of a regularized orderly process of dispute settlement . . . Within this framework . . . the centrality of the concept of due process in the operation of this system." 401 U.S. 371 at 375, 91 S.Ct. 780 at 787. Judicial responsibility is the cornerstone in the implementation of due process and equal protection clauses. *Id.*

"The basic thrust of the due process limitation is that any sanction which does not, at least in part, rest on a litigant's interest in amelioration of prejudice is a deprivation of property by the state, and therefore, certain protections should generally be required." Heiderscheit, *Rule 37*

Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal, 68 Or.L.Rev. 57, 72-73 (1989);[26] *See also, Hovey v. Elliott*, 167 U.S. 409 (1897); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985).

In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982), the Court stated that Rule 37(b)(2) requires that "any sanction must be just." The implication is that lower courts must apply sanctions in proportion to the discovery infraction and consider the conduct of the opposing party, particularly where the opposing party has not complied with discovery. A sanction is an equitable remedy; it requires that the party receiving the benefit of the sanction must have clean hands. Clearly, this is not the case here.

In 1993, this Court specifically revised the discovery rules by detailing the full disclosure of information requirements to be imposed on all parties. *See*, Selected Rules 26- 37, App. 104-19. Those rules were applied to existing cases on March 31, 1994. Since the May 6, 1991 order could not have become a final order prior to September 12, 1995, the new discover rules now apply to this case, but the district court refused to apply them.

Despite numerous discovery violations including findings that the attorney had made false statements to the court, the Court in *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123 (1990), found that outright dismissal of lawsuit is too severe and that less severe sanction of assessment of

---

[26] After the Supreme Court issued *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 7471 (1976), some scholars criticized the punitive approach on due process grounds. In a Note published in the *Harvard Law Review*, it was noted that punitive sanctions "[i]gnores or understates the problems of fairness in such a rule . . . For instance a requirement of a litigation-ending sanction would be inappropriate in cases where both parties are at fault; to punish one and not the other would be unfair . . . Relying on *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), actual notice that a punitive sanction may be imposed, proof of wilful failure beyond a reasonable doubt and the privilege against self-incrimination [would be required]. 221 U.S. 418, 444-49." Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions", 91 *Harv.L.Rev.* 1033, 1051 (1978). The note stated, "Deterrence of discovery abuses, however frequently can be more effectively achieved if the court employs punitive sanctions other than dismissal . . . . *Id.* at 1054.

attorney fees is also within the court's exercise of its inherent powers to supervise litigation.

The district court judges were fully aware of the information regarding the removal and concealment of the heart and aorta, prior to issuing any orders in 1990 regarding discovery abuses and subsequent dismissal of the lawsuit. The principles enunciated in *National Hockey* also underscore the integral nature of the attorney fee award to the litigation as a whole.

A. Removal And Concealment Of Decedent's Heart Violates Petitioners' Property Interest..

Appellants are entitled to the organs of the decedent under the property rights bestowed by the 5th and 14th Amendments of the United States Constitution. *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), *see also, Whaley v. Tuscola County*, 58 F.3d 1111 (6th Cir. 1995). Property rights are created by existing rules or understandings that flow from an independent source -- rules or understanding that secure benefits and give rise to claims of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *see also, Matthews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901; *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The understandings create claim of entitlement, protected by due process of law. *Memphis Light Gas Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978). In *Brotherton*, the Sixth Circuit held that the next of kin has a property interest in the body and parts of a deceased family member, under the 14th Amendment of the U.S. Constitution.

Under Florida law, Appellants have a right to the deceased body and its parts. *Op.Atty.Gen. 93-70, October 8, 1993; Op.Atty.Gen. 073-275, August 14, 1973.* Florida law restricts the conveyance and transmission of dead body parts for any purpose, even when the body is unclaimed. *See, Fla. Stat. §§ 245.06-245.16 (dead bodies) and 406.01-406.17 (medical examiners).* By implication, any removal of organs must be documented in the decedent's medical records at TCH and must be expressly authorized by decedent's heirs. No such documentation has been identified or is contained in the medical records

or given to the Petitioners by TCH.[27] App. at 126-27. ***Emphasis Added.***

Petitioners' property rights and entitlement to the heart and aorta of the decedent are clearly established under state and federal law. This property interest could not be destroyed without a hearing. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982). Indeed, the Eleventh Circuit characterized pre-deprivation of process "an egregious abuse of governmental power." *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1456 n. 5 (11th Cir. 1985).

The body parts, the heart and aorta, are significant material evidence. They will demonstrate with 100 percent certainty that Respondents falsified the medical records, concealed the acts, lied to the court and violated discovery repeatedly. For this behavior, they have been rewarded with dismissal of the lawsuit and attorneys' fees relating to the discovery infractions set by the district court.[28]

B. Alternatively, Sanction of Dismissal Plus Attorney Fees is Reversible Error.

1. Sanction Must Be Subject of Proper Discovery Order. Be Subject of Proper Discovery Order.

In order for a sanction of any kind under Rule 37 to be imposed, any order in issue must be valid. The array of orders and alleged acts by Petitioners were issued contrary to law and supported by clearly erroneous findings of facts, under *Rule 52*. *See, Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1376 (10th Cir. 1978), *cert. denied*, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1978); *Hickman v. Taylor*, 153 F.2d 212 (3d Cir. 1945), *aff'd.*, 67 S.Ct. 385, 329 U.S. 495, 91 L.Ed 451 (1947), *cited in* Wright & Miller *Federal Practice and Procedure: Civil Section 2006* (West 1970). The series of orders granting the Scheduling Conference, authorizing the depositions of the doctors without the Rule 26 (b)(4)(ii) motion and denying the Motion to Quash were improper.

---

[27] In *Brotherton*, "Mrs. Brotherton did not learn that her husband's corneas had been removed until she read the autopsy report." *923 F.2d 477, 478.*

[28] Compare, the district court ordered Petitioners to return the original x-rays of the decedent to TCH, even when TCH did not properly file a motion or make a discovery request on June 26, 1986. R1-76. It said that the x-rays were the property of TCH.

App. at 124. The district court did not follow its own Scheduling Order. *Id.* The district court said that Connie Reshard waived her right to the provisions of the Scheduling Order, but at the same time, she was resisting the request to schedule the depositions of the expert witnesses. *Id.;* App. 60-64. But compare, no Respondent had supplemented their interrogatories by giving the names of their expert witnesses under Rule 26 - 41 and the Scheduling Order so that Plaintiffs could have prepared their experts for the depositions in issue.[29] R4-194-6; App. at 64. The organs were concealed from Petitioners through false and/or incomplete answers to interrogatories and failure to produce medical records containing this information. The record of the hearing on June 29, 1990 is altered and the district court ignored the information. *Id.;* R15-25, line 17-24; 26, lines *15-17.* This incorrect transcript is in violation of 28 U.S.C.A. § 753. *Antoine v. Byers & Anderson, Inc.,* 113 S.Ct. 2167, 2171-2172. The transcript is designated as the Order in support of findings that Petitioner Connie Reshard acted improperly. R15-1-75. These examples underscore that the basis for the sanctions is improper.

2. Lack Of Prior Sanctions And Warning Of Dismissal And Severity of Sanctions Are Reversible Error.

The district court did not issue any prior sanctions. It gave no warning that dismissal was a potential sanction when sanctions were to be first applied. Wright and Miller, *Federal Practice and Procedure:* Civil Section, ¶ 2284 (West 1970); R10-376-57-60.

"Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why." *Chambers,* 501 U.S. at 49, 111 S.Ct. at 2135, 115 L.Ed.2d at 48. This requirement means that the district court was required to give some indication of the type of sanction it contemplated. To apply the most severe form of sanction, dismissal of the case, when, if required, lesser sanctions were available is an abuse of discretion. By virtue of stating that it considered lesser sanctions is insufficient to meet the

---

[29] While the magistrate judge claimed to be willing to provide any judicial assistance to Plaintiffs, he ignored their request for assistance in obtaining the information in open court on June 29, 1990, when Andrews (counsel for Moore) stated that she was using her expert witness to prepare for the depositions of Taylor and Peniston, without having supplemented the Plaintiffs' interrogatories. R15-25,26.

requirement. The alleged conduct must be sufficient to warrant the sanction of last resort.

The prevailing rule in the Eleventh Circuit is that dismissal is considered a drastic sanction. It may only be granted as a last resort. *World Thrust Films, Inc. v. Int'l. Family Entertainment, Inc.*, 41 F.3d 1454, (11th Cir. 1995) (dismissal granted for failure to comply with local rules and to serve process: reversed because no lesser standards specifically discussed). The Eleventh Circuit, sitting en banc, stated: "Invocation of a Court's inherent power requires a finding of bad faith." *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) *(en banc)*. But the court must afford the sanctioned party due process, both in determining the existence of bad faith and in assessing fees.

The Eleventh Circuit has held that the highest opportunity to be heard must be afforded when a sanction is punitive, *Donaldson v. Clark*, 786 F.2d 1570 (11th Cir. 1986), *rev'd.*, 819 F.2d 1551. In this regard, the district court ignored the fact that TCH certified under oath in answering Plaintiffs interrogatories, that it had disclosed all information regarding the decedent when in fact it had not. *Supra*. Other records have been destroyed but no defendant was ordered to produce or admit that the items have been destroyed, thyroid scan, clinical summary by Dr. Chokhawala are illustrative. *Fla. Stat. § 395.3015, et seq.* The action by the district court directly conflicts with procedures number (4) and (5) used in the Ninth Circuit: "(1) public interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on the merits; and, (5) the availability of less drastic sanctions. *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1413 (9th Cir. 1990) *(*corporation repeated failure to appear at scheduled depositions compounded by noncompliance with court orders to produce documents warranted default judgment; defendant failed to appear at 6 separate depositions).

In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 707, 102 S.Ct. 2099, *2106*, the court stated that *Rule 37(b)(2)* requires that "any sanction must be just." The implication is that lower courts must apply sanctions in proportion to the discovery infraction and consider the conduct of the opposing party, particularly where the opposing party has not complied with discovery. *See, e.g.*, [old and new] Rule 37(a)(3). failure to answer. TCH gave incomplete

answers regarding the decedent's record, *e.g.*, the heart and aorta. No bad faith determination was directed to TCH. This is more egregious than any infraction that the district court has alleged against Petitioners.

In applying those principles to this case, it was an abuse of discretion to dismiss the case. *Chambers v. NASCO Inc.*, 111 S.Ct. 2123. There has been no prejudice to defendants under these facts. "A defendant suffers prejudice if the plaintiff's action impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case . . . Delay alone has been held to be insufficient prejudice, "citation omitted," failure to produce documents as ordered is considered sufficient prejudice. "citation omitted" 913 F.2d at 1412.[30] ***Emphasis Added*** Plaintiffs produced all documents requested. Instead the district court deferred until the trial making any factual determinations involving discovery infractions involving the Defendants. App. at 42-57. This is reversible error.

The **Eight Circuit** reversed a district court order which imposed sanctions for failure to make discovery because it found both parties had failed to proceed with discovery. *Equal Employment Opportunity Commission v. Carter Carburetor*, 577 F.2d 43, 48 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 865 (1979).

The availability of less drastic sanctions was explained in *Malone v. United States*, 833 F.2d 128, 130 (9th Cir. 1987), *cert. denied sub nom Malone v. Frank*, 458 U.S. 819, 109 S.Ct. 59, 102 L.Ed.2d 37 (1988). It stated:

> "did the court explicitly discuss the feasibility of less drastic sanctions ***and*** explain why alternative sanctions would be inappropriate; did the court implement alternative sanctions before ordering dismissal, and, did the court warn the party of the possibility of dismissal?" *Id* at 132; *In re Rubin*, 769 F.2d 611, 618, n. 7 (9th Cir. 1985).

Taken in its entirety, due process is violated when the nonsanctioned party is guilty of discovery violations, but is rewarded with

---

[30] The Ninth Circuit stated the requirements of due process of law this way: "Sanction interfering with a litigants claim or defenses violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d. 585 (9th Cir. 1983).

dismissal of the lawsuit and attorney fees with cost. The findings made by the district court did not regarding discovery infractions by Petitioners did not potentially interfere with the rightful decision of the case.

The district court relies on *Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d 480 (11th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). There the Plaintiff was said not to have served adequate answers to interrogatories three times. Here, Plaintiffs were not found to have made repeated infractions, and but for, the local bias and prejudice, the district court would not have dealt so harshly with the incidents it cites in support of the sanctions. For example, the pretrial conference incident would have been a misunderstanding to a fair and impartial tribunal. Consider that TCH and Dr. Chokhawala failed to produce copies or reasonably explain the missing clinical summary prepared by Dr. Chokhawala which is required by Florida law. Fla. Stat. § 395. 3015. Petitioner Leroy Reshard corroborated Connie Reshard's testimony that the document in issue did exist, but disappeared from the hospital records and from Tallahassee attorney Elwin Thrasher's custody of a set of records. Leroy Reshard Aff., *supra* at n. 11.

3. Failure Of District Court To Make Correct Material Findings Of Fact Under Rule 52 Violates Due Process 0f Law and To Grant A Rule 60 (b) Motion Is Reversible Error.

The District Court has the power to decide issues of law and fact under Rules 11, 37, 16, and 41 and its inherent powers. *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2132; *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). Therefore, the failure of the district court to make or amend factual findings under Rule 52, of the following issues against Respondents is prejudicial error: (i) the destroyed clinical resume on the diagnosis and prognosis of decedent by Dr. Chokhawala in August 1983; (ii) the issue of the destroyed thyroid scan clearly in the possession and control of TCH and the physician involved, presumably Dr. Bonk, the resident nuclear medicine expert at TCH, *see* App. at 122-23, *but cf.* App. 45-51 ; (iii) the discrepancy in the location of the decedent's dissecting aneurysm in actuality confined to a tiny area immediately above the heart in the ascending aorta instead of the false autopsy report that the aneurysm was so evasive it extended all the way down to the renal arteries,

accentuated by the possession of her heart and aorta, the primary evidence, R7-281-exht. K, by TCH; and (iv) the removal of and custody of decedents organs.

The findings of fact are clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 578, 105 S.Ct. 1504 (1985). The Court stated:

> "[D]ocuments or objective evidence may contradict the witness' story or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. When such factors are present, the Court of Appeals may well find clear error even in a finding purportedly based on a credibility determination."

Additionally, "A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. U.S. Gypsum Co.*, 333 U.S. 364 at 396, 68 S. Ct. 525 at 542 (1947).

Petitioner was found by the district court to have lied about Dr. Robert Taylor having been retained as an expert witness and about the substance of his opinion. App. 77. Dr. Taylor's testimony is contradicted by documents and objective evidence and his story is internally inconsistent and implausible on its face so that a reasonable fact finder would not credit it, in part, based on a letter he gave to Petitioners on July 3, 1986. App. at 125. As a result, this Court should find clear error under the principles enunciated in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 154, 109 S.Ct. 439, 442, 102 L.Ed.2d 445 (1988). Findings 1, 2, 3, 4 and 5, *Id.* at 77, contained in the Magistrate Judge 's Order, Report and Recommendation of December 6, 1990, are interrelated and formulated on the basis that Dr. Taylor's testimony is true. *App. 71-77; but cf* , App. 125-26. Dr. Taylor has denied that he read the decedent's chest x-rays and medical records, formulated medical opinions thereof, and agreed to be an expert witness. But at his deposition, he stated that he reviewed the records. *Id.* at 125-26.

The concealment of the heart and aorta cast serious doubt as to the veracity of the autopsy report and other medical records of the decedent. Petitioners' Motion to Vacate Findings of Fact under Rule 60(b), *Fed. R. Civ. P.* should have been granted. R9-344. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194,

2204, 100 L.Ed.2d 855 (1988). Rule 60(b)(6) states that a final judgment may be reopened when the risk of injustice to the parties, in the particular case, and the risk of undermining the public confidence in the judicial process is compromised. *Id.*

III. WHETHER DISMISSAL OF THE APPEAL IS INVALID BECAUSE THE ISSUE OF DISMISSAL IS A SECONDARY ARGUMENT IN SUPPORT OF REDUCTION OF THE AMOUNT OF ATTORNEY FEES AND JUDICIAL DISQUALIFICATION.

A. Issue Of Dismissal Is Permissible Element In Support Of A Reduction In Attorney Fees .

The district court set attorney fees and cost too high, and without holding a hearing pursuant to provisions outlined in *King v. McCord*, 621 F.2d 205 (5th Cir. 1980) and its own order. App. at 39, ¶ 3. Whenever disputable issues of fact exist regarding the determination of attorney fees, an evidentiary hearing must be held to resolve the conflict. *Id* at 206. "The amount of the award for such services should, as a general rule, be fixed in the first instance by the district court, after hearing evidence as to the extent and nature of the services rendered." *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1968). Petitioners presented documentation of disputed issues of fact.

The Supreme Court adopted the lodestar approach in setting the amount of attorney fees. *Henlsey v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 40 (1983) (statutory fee award to prevailing party); *Normal v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1299, 1301 (11th Cir. 1988) appeals generally have recognized the relevancy of the results obtained to the amount of a fee award." 461 U.S. at 431. Hours reasonably expended must not be "excessive, redundant or otherwise unnecessary" and such hours must be excluded. 461 U.S. at 434, 103 S.Ct. at 1939-40.

This Court concluded that the determination of attorney fees is an equitable judgment. *Id.* at 437. Just as the level of success is an issue in determining fee awards, so is the interrelationship of dismissal as a sanction and fee award as a sanction. Here, the district court held that redundant attorney fees is harmless error. App. 18, ¶ 1. Respondents were permitted to set cost and fees far in excess of the estimates presented in their discovery plans. R2-102. The district court

has an obligation to award a reasonable fee. 461 U.S. at 437. This requires an adjusted fee. Insufficient documentation warrant changes in fee awarded. *Slimfold Mfg. Co. v. Kinkdead Industries, Inc.*, 932 F.2d 1453, 1459 (Fed. Cir. 1991). It is also required that the Defendants give specific and detailed evidence for each claim. The court is required to give a detailed explanation as well in support of accepting those claims, which it did not do. Petitioners were, therefore, justified in raising all of these issues, including the sanction of dismissal.

B. Issue Of Disqualification Of District Court Judges Is Permissible And Issue Of Dismissal Valid Element Of Argument.

1. Local Bias And Prejudice Are Relevant Issues.

Petitioners have outlined numerous instances in the record where the district court judges refused to take any negative action against the Defendants, irrespective of their conduct. *Supra.* The only discernible reason is local bias and prejudice. Chief Judge Stafford made it clear on September 2, 1986 in open court that Petitioner was from out-of-state and that there were many lawyers in Tallahassee and Florida that she could hire. R13-30,31; R2-76. He told her to hire Elwin Thrasher to handle this case because he knows the local turf.[31] R13-30, 31.

---

[31] Thrasher was hired as a probate attorney on August 14, 1983. He provided an initial evaluation of the wrongful death case. His review is totally inconsistent with all the medical literature and expert opinions obtained by Petitioners. More importantly, he had custody of Petitioners' copy of a typewritten clinical resume prepared by Dr. Chokhawala in August 1983, a defendant he is acquainted with. That document required by state law, Fla. Stat. 395.3015, is no longer in the medical records of the decedent, neither is it in those records obtained from Dr. Chokhawala or TCH. App. 120. William Davis, counsel for TCH, discussed the case with Connie Reshard in great detail in 1984, but later associated with TCH. The district court refused to find a conflict of interest and disqualify him. R7-287-2.

Once Petitioners filed the Motion to Disqualify the district court judge and magistrate judge in May 1990, both were required to review their conduct under *28 U.S.C. §§* 144 and 455. R10-404. All facts stated with particularity are to be taken as true. *United States v. Halderman,* 559 F.2d 31, 131. (D.C. Circuit 1976) "The affidavit must be strictly construed; it must be definite as to time, place, persons and circumstances . . . must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Id.* at 134. Petitioners met this burden.

The failure of the district court judge to correct the record and to authorize the release of all original tapes as is required by section 753 constitutes a clear violation of law. *Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 113 S.Ct. 2167, 2171-2172. The presumption of accuracy of the official record of court proceedings under § 753 is a rebuttal presumption. In order to demonstrate that the official record does not conform to the truth, complete access to all original stenographic tapes, original audio tapes, and original notes must be made available to any party who request such documentation. The failure of the district court to comply with § 753 by making the tapes public is a per se violation of due process of law. Similarly, due process of law is violated when the district court fails to direct Petitioner TCH to return the organs of decedent, constitutionally protected property, *supra,* a clear violation of federal and state law. In *Mallard v. United States District Court for Southern District of Iowa,* 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989), this Court ordered disqualification because the judge exceeded authority through "coercive appointment of counsel" under 28 U.S.C. § 1915 (d), a clear violation of law.

2. Discussion Of Sanction Of Dismissal Relevant To Extrajudicial Exception To Disqualification. 2. Discussion Of Sanction Of Dismissal Relevant To Extrajudicial Exception To Disqualification.

The fact that the misconduct complained of occurred during the course of the litigation in this case is not fatal. When the conduct of the district court judge shows the level of "deep-seated favoritism or antagonism that would make fair judgment impossible" disqualification can be supported by an affidavit containing elements that occurred during the course of judicial proceedings. *Liteky, et al. v. United States,*

114 S.Ct. 1147, 1155; *see also, United States v. Halderman*, 559 F.2d 31, 134 (D.C. Cir. 1976); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); (comments and rulings by judge during trial of case may be relevant to question of existence of prejudice on his part.); *Bradley v. School Board of City of Richmond, Virginia*, 324 *F.Supp.* 439 (D.C.VA 1971) (prejudgment as to facts giving rise to liability or reason to believe such exists, if fairly supported, would establish bias or prejudice requiring judge to disqualify himself.)

For example, Magistrate Judge Sherrill refused to consider the possibility that Respondents destroyed evidence in the case. Regarding the missing clinical resume, he in effect ridiculed Petitioners when the only action he took was to instruct Respondent Chokhawala to type a handwritten note prepared during the actual consultation with the decedent. App. at 50. It was clear from a corroborating affidavit by Petitioner Leroy Reshard that the clinical resume document, a second separate document, originally in the record was a one page typed document in addition to the handwritten consultation notes. App. at 133, ¶ E. Neither district court judge ever questioned any Respondent about any issue raised in the case. No respondent was asked to explain any action that it took, despite Magistrate Sherrill's statements that he had to determine who was at fault.

Both the appellate court and the lower court allowed ***ex parte*** matters to be filed in this case, issues that were highly prejudicial and irrelevant to this case under the Federal Rules of Evidence.[32] R12-472-3-11). Citing the appearance of impropriety, the District of Columbia Circuit reassigned a case on remand because the district court judge

---

[32] District court denied Petitioners' motion to strike. R12-477-1. TCH filed the same information in the Court of Appeals on June 26, 1996.

Under Rules 401, 402, 403 and 404, Fed. R. Evid., only issues relevant to the case at bar can be raised in the case. *See, Redd v. City of Phenix City, 934 F.2d 1211, 1213 (11th Cir. 1991); Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153, 1159 (11th Cir. 1986).* Rule 403 specifically requires the court to weigh the probabitve value of the evidence against the danger of unfair prejudice. Fed. R. Evid. 403. No adverse findings of misconduct have been found against Connie Reshard, in fact or otherwise, in any of these cases. Any references to other cases, would have no relevancy or probative value in deciding the issues presented for disqualification in this case or any other matter in this case. *See, Doyle v. Murray, 938 F.2d 33 (4th Cir. 1991)* (counsel's conduct in unrelated litigation has no bearing on matters pending in another case.) *Ex parte* matters are irrelevant, immaterial and prejudicial.

rejected a settlement agreement between the parties and because he exceeded his authority by allowing *ex parte* matters to be filed. United States v. Microsoft Corp., 312 U.S.App.DC 378, 393.

CONCLUSION

Notwithstanding the fact that this case is an aberration within the Eleventh Circuit and other Circuits it has a long history of incorrect decisions. Without this Court's intervention, this manifestation of injustices, so repugnant to the Constitution and our judicial system, will remain as a gloss on equal justice under the law.

Respectfully submitted,

Connie C. Reshard, Esquire
1101 Third Street, S.W., Suite 812
Washington, D.C. 20024
(202)-484-7002

August 27, 1997 *Counsel for Petitioners and Pro Se*

NO. 96-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CONNIE RESHARD *and* LEROY RESHARD,
Co-Personal Representatives of the Estate of MINNIE LEE RESHARD on Behalf of the Estate *and* Certain Survivors,

Petitioners,

VERSUS

DR. EARL BRITT, DR. GEORGE BONK,
DR. DAVID MOORE, DR. PANKAJ CHOKHAWALA,
TALLAHASSEE MEDICAL CENTER, INC.
d.b.a., TALLAHASSEE COMMUNITY HOSPITAL,

Respondents,

VERSUS

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER,

Defendant.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI APPENDIX

CONNIE RESHARD, ESQUIRE
1101 THIRD STREET, S.W., SUITE 812
WASHINGTON, D.C. 20009
202-484-7002

ATTORNEY FOR PETITIONER

August 27, 1997

TABLE OF CONTENTS

PAGE

Petition for Rehearing and Suggestion of Rehearing En Banc Denied, 4/29/97 ---- 1
Appeal No. 95-3470 Dismissed, 1/15/97 ---- 3
Order Denying Appellants' Motion to Vacate and Setting Date for Appellants to File Corrected Brief, 11/14/96 ---- 5
Letter from Clerk to C. Reshard, 4/1/96 ---- 6
Excerpts From Civil Appeal Statement ---- 7
Order, 6/26/96 ---- 8
Order Denying Appellee Tallahassee Community Hospital Motion to Dismiss, 6/26/96 ---- 9
Order Requiring Appellants to File a Corrected Brief, 9/25/96 ---- 10
Order Striking Appellants' Reply, 8/19/96 ---- 11
District Court, Plaintiffs' Motion for Reconsideration is Denied, 11/28/95 ---- 12
District Court, Plaintiffs' Motion for Reconsideration is Denied, 10/24/95 ---- 13
District Court Judgment, 9/19/95 ---- 14
District Court Order Adopting Report and Recommendation, 9/12/95 ---- 15
Report and Recommendation, 1/25/95 ---- 16
District Court Order Adopting Report and Recommendation, 7/5/94 ---- 22
Report and Recommendation, 7/27/93 ---- 26
District Court Order, 4/19/93 ---- 31
Court of Appeals Judgment, No. 91-3542,9/30/92 ---- 33
Court of Appeals Issues Mandate, 2/26/97 ---- 35
Order Denying Appellants' Motion for Reconsideration, 12/23/92 ---- 35
Order Denying Appellants Motion to Settle the Record, 9/30/92 ---- 35
District Court Order of Sanctions - Dismissal of Action, Attorneys Fees and Costs, 5/6/91 ---- 36
Magistrate Judge Sets Schedule for Setting

the Amount of Attorneys Fees, 5/7/91 ---- 39
District Court Order Denying Plaintiffs' Motion
to Disqualify Judges, 6/5/91 ---- 40
Order Construing Plaintiffs' Motion for Reconsideration
of Report and Recommendation 4/10/91 ---- 42
Report and Recommendation of Sanctions,
December 14, 1990 ---- 44
District Court Order Authorizing Certain
Depositions on Behalf of Defendants to the
Exclusion of Plaintiffs' Discovery, 4/12/90 ---- 84
United States Statutes ---- 85
28 U.S.C. A. § 144 (West Supp. 1997) ---- 85
28 U.S.C. A. § 455 (West Supp. 1997) ---- 85
28 U.S.C. A. § 636 (West Supp. 1993) ---- 85
28 U.S.C. A. § 753 (West Supp. 1997) ---- 85
28 U.S.C. A. § 1254 (West Supp. 1997) ---- 86
28 U.S.C. A. § 1291 (West Supp. 1997) ---- 86
28 U.S.C. A. § 1332 (West Supp. 1997) ---- 86
Federal Rules of Appellate Procedure ---- 86
Rule 4 (West Supp. 1993) ---- 86
Rule 10 (West Supp. 1993) ---- 87
Rule 27 (West Supp. 1997) ---- 87
Rule 34 (West Supp. 1997) ---- 88
Federal Rules of Civil Procedure (West Supp.1993) ---- 88
Rule 11 ---- 88
Rule 16 ---- 89
Rule 26 ---- 91
Rule 30 ---- 95
Rule 32 ---- 96
Rule 33 ---- 97
Rule 34 ---- 98
Rule 37 ---- 98
Rule 41 ---- 102
Rule 52 ---- 102
Rule 59 ---- 102
Rule 60 ---- 103
Rule 72 ---- 103

Selected Federal Rules of Civil Procedure, Post December 31, 1993 (West Supp. 1997) ---- 104
Rule 11 ---- 104
Rule 26 ---- 106
Rule 30 ---- 113
Rule 32 ---- 114
Rule 37 ---- 114
Florida Statutes ---- 119
Section 395.002 ---- 119
Section 395.1046 ---- 120
Section 395.302 ---- 120
Section 395.3015 ---- 120
Section 395.3025 ---- 120
Section 768.16 ---- 121
Section 768.19 ---- 121
Section 768.20 ---- 121
Section 768.21 ---- 121
Dr. Britt's Orders Concerning Both a Thyroid Panel and Thyroid Scan ---- 122
Plaintiffs' Motion to Quash the Taking of Depositions, 6/27/90 ---- 124
Dr. Robert Taylor Letter to Connie Reshard, July 3, 1986 ---- 125
Excerpts From Dr. Taylor's Deposition Transcript 7/17/90 ---- 125
Answers to Interrogatories and Production of Documents by Tallahassee Community Hospital ---- 126
Excerpts From Rosa Walker-Virgil's Deposition Transcript 6/28/90 ---- 128
Affidavit of Leroy Reshard, July 29, 1990 ---- 130
Affidavit of James Reshard, July 21, 1990 ---- 136
Affidavit of Tommye Carr, July 21, 1990 ---- 139

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,
Co-Personal Representatives of the
Estate of Minnie Lee Reshard on behalf of the
Estate and Certain Survivors,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, DR. GEORGE BONK,
DR. PANKAJ P. CHOKHAWALA, DR. DAVID
MOORE, TALLAHASSEE MEDICAL CENTER, INC.,
d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL
MEDICAL CENTER INC.,

Defendant.

On Appeal from the United States District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF
REHEARING EN BANC

(Opinion_____, 11TH Cir., 19__, ____F.3d_____).

Before: TJOFLAT, ANDERSON and BIRCH, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/
UNITED STATES CIRCUIT JUDGE

Filed April 29, 1997

App. 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,
Co-Personal Representatives of the
Estate of Minnie Lee Reshard on behalf of the
Estate and Certain Survivors,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, DR. GEORGE BONK,
DR. PANKAJ P. CHOKHAWALA, DR. DAVID
MOORE, TALLAHASSEE MEDICAL CENTER, INC.,
d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL
MEDICAL CENTER INC.,

Defendant.

On Appeal from the United States District Court for the
Northern District of Florida

Before: TJOFLAT, ANDERSON and BIRCH, Circuit Judges

BY THE COURT:

Appellants' "motion to clarify June 26, 1996 order and instruction" is DENIED.

Appellants' "motion to vacate appeal no. 91-3542 is DENIED.

Appellants' "motion for vacation by merits panel," construed as a motion for reconsideration of this court's 11/14/96 order, is DENIED.

Appellee Tallahassee Medical Center's "suggestion to clerk for entry of court-ordered dismissal," construed as a motion to dismiss this

appeal based on Appellants' non-compliance with this court's 11/14/96 order, is GRANTED.

ENTERED FOR THE COURT: Filed January 15, 1997

/S/
UNITED STATES CIRCUIT JUDGE

App. 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, et al.,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of Florida

BEFORE: TJOFLAT, ANDERSON and BIRCH, Circuit Judges

BY THE COURT:

Appellants' "motion to vacate orders," construed as a motion to reconsider this court's 8/19/96 is DENIED.

Appellants' "motion to vacate orders," construed as a motion to reconsider this court's 9/25/96 order striking a portion of Appellants' brief is DENIED. If Appellants do not file a corrected brief in full compliance with the 9/25/96 order within 14 days of the date of this order, the clerk is directed to dismiss this appeal for want of prosecution, regardless of whatever motions or pleadings Appellants may file.

Filed on November 14, 1996

App. 6
Letter From Office of the Clerk
United States Court of Appeals
Eleventh Circuit

April 1, 1996
Connie Reshard
P.O. Box 76745
Washington, DC 20013

RE: 953470 - RESHARD V. BRITT, DC No. 85-7216-WS

Presently the court has before it for review a motion to dismiss by Appellee Tallahassee Community Hospital, appellant's response to motion to dismiss, and appellant's motion to comply. The court has requested that the enclosed appeal information sheet and civil appeal statement be completed and filed to submit for review along with these outstanding motions. Please complete and return these enclosed forms within fourteen (14) days from the date of this letter.

If you have any questions regarding this matter, please let me know.

Sincerely

MIGUEL J. CORTEZ, Clerk
By:
Nancy Holbrook
Deputy Clerk
(404) 331-3833

App. 7

EXCERPTS FROM

CIVIL APPEAL STATEMENT FORM

Page no. 2:

ISSUES PROPOSED TO BE RAISED ON APPEAL INCLUDING JURISDICTIONAL CHALLENGE

Plaintiffs-Appellants Response:

Whether the sanction of dismissal and attorney fees plus costs including the setting of the dollar amount were warranted under the Federal Rules of Civil Procedure and/or voidable under 28 U.S.C. §§ 753, 144 and 455, consistent with the requirements of due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution?

"SUPPLEMENT TO CIVIL APPEAL STATEMENT"

- September 12, 1995 Order Adopting Report and Recommendation of Sanctions for Attorney Fees.
- Report and Recommendation of Magistrate Judge, January 25, 1995.
- July 5, 1994 Order Adopting Magistrate Judge's Report and Recommendation of July 27, 1993.
- July 27, 1993 Magistrate Judge's Report and Recommendation Awarding Attorney Fees Portion of Sanctions.
- May 6, 1991 Order Adopting Report and Recommendation of Magistrate Judge for Sanctions of Dismissal and Attorney Fees.
- December 14, 1990 Report and Recommendation of Magistrate Judge for Sanctions of Dismissal and Attorney Fees.
- June 5, 1991 Order of District Court Judge William Stafford denying Motion to Disqualify the Magistrate Judge William Sherrill and Chief Judge William Stafford.

App. 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, et al.,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Appellee Britt and Moore's separate "notices of joinder," construed as motions to adopt Appellee Tallahassee Medical Center's motion to dismiss this appeal for want of prosecution, are GRANTED.

Appellants' letter to the clerk dated 4/11/96 construed as a motion to file their Appeal Information Sheet and their Civil Appeal Statement out of time, is GRANTED.

Appellants' "motion to comply with filing requirements" is DENIED AS MOOT.

/s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

Filed June 26, 1996

App. 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, et al.,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of Florida

BEFORE: ANDERSON, EDMONDSON and BARKETT, Circuit Judges.
BY THE COURT:

Appellee Tallahassee Medical Center, Inc.'s motion to dismiss this appeal for want of prosecution is DENIED.

FILED JUNE 26, 1996

App. 10

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, et al.,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Appellee Tallahassee Medical Center, Inc.'s motion to strike Appellants' corrected brief is GRANTED. Appellants are ORDERED to file a corrected brief deleting all arguments that the district court's dismissal of their complaint was improper. This issue was resolved against Appellants in 91-3542.

Appellee Earl Britt's motion to strike Appellants' brief is DENIED AS MOOT.

The motions filed by Appellees Moore, Bonk, Chokhawala, and the two motions filed by Appellee Britt to adopt Tallahassee Medical Center, Inc.'s motions to strike and to dismiss Appellants' appeal are GRANTED.

Appellants' "motion for leave to file a consolidated response. . ." is DENIED AS MOOT.

Appellants' motion to strike is DENIED.

/S/
UNITED STATES CIRCUIT JUDGE

File September 25, 1996

App. 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3470

CONNIE C. RESHARD and LEROY RESHARD,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, et al.,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Appellee Tallahassee Medical Center, Inc.'s "motion to strike Appellants' response to Appellees' objections to Civil Appeal Information Statement" is GRANTED. This court's rules do not permit Appellants to file replies to responses to Civil Appeal Statements.

/s/ Joseph Hatchett
UNITED STATES CIRCUIT JUDGE

Filed August 19, 1996

App. 12

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. TCA 85-7216-WS
REFERRAL AND ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

Referred to Judge William Stafford on 10/19/95. Motion/Pleadings: Motion for Reconsideration of Order Adopting Report and Recommendation, Failure to Incorporate Plaintiffs Reply in Record ...

Filed by Plaintiff on 9/27/95, Doc. #481 RESPONSES: None

ROBERT A. MOSSING, CLERK, BY A. Sullivan, Deputy Clerk

ORDER OF COURT: It is ORDERED this 28th day of November, 1995, the requested relief is denied.

/s/
WILLIAM STAFFORD, UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET 10/29/95 BY /as/

Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP
Copies mailed to : Davis, Andrews, Smith, Smoak, Collins, Reshard, Reshard.

App. 13

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v.

TCA 85-7216-WS
REFERRAL AND ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

Referred to Judge William Stafford on 10/24/95. Motion/Pleadings: Motion for Reconsideration (judgment of 9/19/95).

Filed by Plaintiff on 10/2/95, Doc. #482

RESPONSES: None

ROBERT A. [illegible]OSSING, CLERK
BY A. Sullivan, Deputy Clerk

ORDER OF COURT

It is ORDERED this 24th day of October, 1995, the requested relief is denied.

/s/
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET 10/24/95 BY /as/
Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP

Copies mailed to : Davis, Andrews, Smith, Smoak, Collins, Reshard, Reshard.

App. 14

JUDGMENT IN A CIVIL CASE

United States District Court	Northern District of Florida
Case Title: CONNIE C. RESHARD, et al V. DR EARL BRITT, et al.	Docket Number 85-7216-WS Name of Judge or Magistrate Judge WILLIAM STAFFORD
__Jury Verdict. This action came before the Court and a jury with the judicial officer above presiding. The issues have been tried and the jury has rendered its verdict.	
X Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.	
IT IS ORDERED AND ADJUDGED	
Judgment is entered against Plaintiffs for attorney fees and expenses in the following amounts: Defendant Britt is awarded attorneys' fees and expenses in the amount of $11,907.59; Defendant Bonk is awarded attorneys' fees and expenses in the amount of $4,770.65; Defendant Tallahassee Community Hospital is awarded attorneys' fees and expenses in the amount of $18,493.66 for the work before this court; Defendant Chokhawala is awarded attorneys' fees in the amount of $8,249.65; Defendant Moore is awarded attorneys' fees in the amount of $8,113.50; and Defendant Tallahassee Community Hospital is awarded attorneys' fees for appellate fees in the amount of $21,786.	
ROBERT A. MOSSING, CLERK By Deputy Clerk: M. Sweeney /s/	September 19, 1995

ENTERED ON DOCKET September 19, 1995 BY /MS/
Copies mailed to: Davis, Andrews, Smith, Smoak, Collins, Connie Reshard

App. 15

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. **TCA 85-7216-WS ORDER ENTERED ON DOCKET : 9/12/95**

DR. EARL BRITT, et al.,
Defendants.

_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation (document 469). The magistrate judge recommends that the court enter judgment against plaintiffs for attorneys' fees in the following amounts:

1. $8, 249.65 in favor of Pankaj P. Chokhawala.
2. $8,113.50 in favor of David Moore.
3. $21,786.00 in appellate fees in favor of Tallahassee Community Hospital.

Having considered the magistrate judge's report and recommendation (document 469) and the parties responses thereto (documents 470, 472, 474 and 475), the court determines that the report and recommendation should be adopted. Accordingly it is ORDERED:

1. The magistrate judge's report and recommendation (document 469) is adopted and incorporated by reference into this order of the court.

2. Defendant Chokhawala is awarded attorney's fees in the amount of $8,249.65.

3. Defendant Tallahassee Community Hospital is awarded attorneys' fees for appellate fees in the amount of $21,786.00.

4. Based upon this order and the court's July 5, 1994, order (document 452), the clerk shall enter judgment awarding fees and expenses accordingly.

DONE AND ORDERED this 11th day of September, 1995.

/s/

WILLIAM STAFFORD, UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. TCA 85-7216-WS
ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

REPORT AND RECOMMENDATION

District Judge Stafford has remanded specific issues concerning the request for attorneys' fees filed by Defendants Moore, Chokhawala, and Tallahassee Community Hospital (TCH). Doc. 452. Moore has filed an affidavit. Docs. 453 and 454. TCH has filed a response, doc. 455, which refers to doc. 442 for support. Chokhawala has filed an additional affidavit. Docs. 457 and 458. Additionally, small errors were detected, and corrections to the claims made.

By order entered on July 28, 1994, the parties were notified that the issues on remand would be determined on or after September 6, 1994. Doc. 462. Plaintiff Connie Reshard gave notice of her change of address on August 24, 1994, doc. 465, and the time for a response was extended. Docs. 464 and 466. Plaintiffs have filed a response. Docs/ 467 and 468.

Recusal

While doc. 468 responds to the pending attorneys' fees issues, it also appears to move that the undersigned recuse himself from consideration of these remaining questions. An earlier motion was denied. Doc. 439. A new basis for recusal has not been presented. As previously ordered, an adverse ruling is not a basis for recusal. The undersigned has no "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" relating to the remaining issues, or any issue, for that manner, which would warrant recusal. 28 U.S.C. § 455(b)(1). The request for recusal of the undersigned is again denied.

Issues remaining and Plaintiffs' request for a hearing

The only remaining issues are those identified by Judge Stafford pertaining to the reasonableness of certain hours claimed. Plaintiffs argue that a hearing is needed to determine how much the various attorneys shared the work of one another. Plaintiffs were entitled to conduct some discovery on the motions, but apparently have not. Actual duplication of work is not obvious from any of the affidavits. Given the numerous other cases demanding attention before this court, it would be inefficient for this court to provide a forum for discovery by way of an evidentiary hearing. The purpose of a hearing is to litigate that which the parties have prepared in advance and know to be reasonably debatable. Accordingly, Plaintiffs' request for a hearing is denied. The issues remanded will be discussed herein in the order identified by Judge Stafford's order.

Dr. Chokhawala, 72.5 hours claimed relating to the attempted depositions of Drs. Peniston and Taylor

As itemized, it is apparent that these 72.5 hours involve work from June 20, 1990, to December 6, 1990, and not simply the attempted depositions of Plaintiffs' two experts. Doc. 458. Thirty hours of this time was spent by counsel for Dr. Chokhawala on July 16, 17, and 18, 1990, in preparation for two days of depositions in Washington, D.C., which never took place. Under ordinary circumstances, this might be an unreasonable expenditure of time. In this case, however, the waste of attorney time was caused by Plaintiff Connie Reshard as found in the first report and recommendation. The motion to quash these deposition subpoenas was denied, and Plaintiffs were forewarned that their expert witnesses had to be made available for a deposition. Such expert testimony was central to the merits of the case, and Defendants had a right to conduct this discovery. Indeed, it was the events that then occurred-- the refusal of Plaintiffs to prepare these experts for a deposition--which in part resulted in dismissal of the complaint with prejudice.

The remaining hours set forth in the affidavit are reasonable as well. This was simply the aftermath, the time needed for counsel to prepare and litigate the motions for sanctions flowing from the failed depositions. For this the court relies upon the detailed analysis contained in the report and recommendation and Plaintiffs' objections thereto. In summary, it is recommended that the court find that the 72.5

hours claimed are reasonable and award fees accordingly based upon the previously determined hourly rates.

Dr. Moore, itemization of law clerk and attorney time within the 112.10 hours claimed

Dr. Moore has corrected the deficiency noted by the court. The hours claimed are now set forth in a comprehensive affidavit. Doc. 454. Dr. Moore's attorney, Ms. Andrews, assumed the responsibility of coordinating between all Defendants' lawyers, and her time in doing so is included in part in category A. Category A also includes time preparing for depositions of Drs. Peniston and Taylor. Ms. Andrews claims 39.80 hours. 20.70 of those hours involved her attendance at the depositions which did not take place. Also claimed is 3.40 hours for law clerk Lemle. Id. These hours are reasonable for the reasons stated above. While much of this work duplicated hours spent by counsel for Dr. Chokhawala, such duplication was reasonable. Drs. Chokhawala and Moore each faced potential individual liability based upon separate professional responsibility for the care of the decedent, and consequently, each required separate counsel. The work of one attorney, under this circumstance, could not be delegated to another. This is reasonable.

Category B includes hours spent working on motions and responses filed commencing July 19, 1990, and running to December 17, 1990, a total of 42.90 hours claimed for Andrews, 13.70 law clerk hours, and 3.10 associate hours. These hours are also reasonable as stated above.

Category C is limited to work reviewing TCH's motion to strike, and includes only .90 hours for Ms. Andrews. Category D related solely to work concerning Plaintiff's motion for reconsideration, to suppress, or to strike regarding Dr. Peniston, a total of 4.70 hours for Ms. Andrews. Finally, category E relates to work after the undersigned entered a case dispositive report and recommendation, and claims a total of 3.60 hours for Andrews. These hours are equally reasonable for the work performed.

Finally, Defendant Moore has adequately explained the division of hours between Ms. Andrews, associate Lemle, and law clerk Lemle. Accordingly, it is recommended that the court find the hours to be

reasonable and award fees based upon the hourly rates previously found to be reasonable.

TCH, 83,75 hours for Davis, and 125.50 hours for Dean on appeal

At the outset it is noted that TCH does not seek an attorneys' fee for work expended defending the affirmance on appeal and the Eleventh Circuit's award of appellate fees. Plaintiffs thereafter sought rehearing, suggested a need for rehearing en banc, sought an extension of time staying the mandate, and petitioned for certiorari to the Supreme Court.

The hours claimed for appellate work are for work from July 2, 1991, through October 12, 1992. In 1991, doc. 422, objecting to the jurisdiction of the undersigned, generated 1.5 hours of attorney time for Davis. Dean spent .5 hours checking on the law concerning a cost bond during appeal. Dean spent 5.4 hours researching procedures for preparation of the record on appeal and work generated by Plaintiffs' motion to amend the judgment. Meanwhile, Davis worked on whether to move to dismiss the appeal for Plaintiffs' default to prepare the record. All of this is reasonable.

The time records for 1992 for work devoted to the record on appeal are equally persuasive that neither Dean nor Davis unnecessarily performed the same work, or that any of the work was unreasonable during the appellate process. It is apparent that TCH was involved with time consuming disputes with Plaintiffs as to what was to be in the record on appeal and disagreements as to the facts in the record before this court. The hours claimed as to record on appeal disputes are reasonable.

The appellee's initial brief was prepared primarily by Dean, with collaboration and revision by Davis. Give the importance of this document, it was not unreasonable for two lawyers to have worked on it in this fashion. Davis obviously made use of Dean's work. Dean spent 82.1 hours drafting the brief and in conferences, while Davis spent 27.0 hours in the same sort of work, prior to correction of the brief, and each spent about 8 hours in a final revision. This also is reasonable.

The hours spent by Davis and Dean reviewing Plaintiffs' reply brief and in an attempted settlement is insignificant and reasonable. It appears that Plaintiffs then again sought to disqualify counsel for TCH,

and Dean spent 6.5 hours refreshing this research.[1] Finally, the hours spent with regard to costs and attorneys' fees on appeal, 11.1 hours for Dean, and 2.95 hours for Davis, is reasonable.

In summary, the undersigned finds no fault with any of the hours claimed by TCH for attorneys' fees on appeal. The itemized records appear to reflect a reasonable response to the work required for the appeal.

Accordingly, it is RECOMMENDED that:

1. The court find that 72.5 hours claimed by counsel for Dr. Chokhawala be found to be reasonable, and award to Dr. Chokhawala $8,249.65 as an attorney's fee as previously recommended. This sum includes the 72.5 hours at the previously determined hourly rate.

2. The court find that the 110.7 hours claimed by counsel for Dr. Moore be found to be reasonable as itemized and corrected, and award to Dr. Moore $8,813.50 as an attorney's fee based upon the previously determined hourly rates. This sum includes the 112.10 hours for which more detailed records were provided.

3. The court find that the 125.50 hours claimed by counsel for Tallahassee Community Hospital for appellate work be found to be reasonable as itemized and corrected, and award Tallahassee Community Hospital $21,786.00 as appellate fees based upon the previously determined hourly rates. This declines to consider the few

---

[1]The timing of this suggest that Plaintiffs filed a motion to disqualify counsel in the appellate court. [The order of the district court denying the Disqualification of counsel Davis was included in the appeal along with the sanctions order. Connie Reshard.] If this occured, this would have been a wasteful manner in which to bring this issue to the appellate court. This court ruled on that issue, and Plaintiffs' disagreement with that ruling could have been brought to the appellate court as a point of appeal in the iniital brief. [It was. Connie Reshard.] In any event, further research on this issue, which was hotly disputed in this court and potentially dispositive of the appeal, was reasonable under the circumstances since it is obvious that the issue was pressed in some fashion in the appellate court.

hours spent in this court post-judgment, and covers only the hours spent directly with the appellate court.

IN CHAMBERS at Tallahassee, Florida, this 25th day of January, 1995.

/s/

WILLIAM C. SHERRILL, JR., UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

App. 22

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. TCA 85-7216-WS ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

Before the court is the magistrate judge's report recommendation dated July 27, 1993 (document 446). The magistrate judge recommends that the court enter judgment against Plaintiffs for attorneys' fees and expenses in the following amounts:

1. $9,949.85 in favor of David Moore.
2. $18,493.66 for work before this court, and $21,813.00 as appellate fees, for a total judgment of $30,306.66 in favor of the Tallahassee Community Hospital.
3. $11,907.59 in favor of Dr. Britt.
4. $8,249.65 in favor of Dr. Chokhawala.
5. $4,770.65.

Pursuant to Title 28, United States Code, Section 636(b)(1)(B) all parties have been provided an opportunity to file specific written objections tot he report and recommendation.

In their objections, Plaintiffs have raised several issues that have already been decided by this court and in some instances, affirmed on direct appeal. Specifically, Plaintiffs again raise the recusal issue and the attempt to have sanctions imposed solely upon Plaintiff Connie Reshard. These issues have already been addressed and decided; Plaintiffs shall not raise them or any other decided issues in this court henceforth.

I. Attorneys' Fees:

"The starting point in fashioning an award of attorney fees is to multiply the number of hours reasonably expended by a reasonable hourly rate." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1993). This sum constitutes the "lodestar." *Id.* The burden of proof of establishing the lodestar amount is on the party seeking the award.

Normal v. Housing Auth. of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988). "The party seeking an award of fees should submit evidence supporting hours worked and rates claimed." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "[W]hen a request for attorney's fees does not permit easy division between compensable and non-compensable hours, a district court should require the party seeking fees to refashion its request." *Loranger*, 10 F.2d at 782.

A. Reasonable Hourly Rate:

The first step in computation of attorneys' fees is determining the reasonable hourly rate. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonable comparable skills, experience, and reputation." *Norman*, 836 F.2d 1299. Generally, the reasonableness of a rate is established by evidence of rates charged by lawyers under similar circumstances and/or by opinion evidence. Also, a court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Loranger*, 10 F.3d at 781.

In this case all of the defendants have provided the court with affidavits from their attorneys and other attorneys from the community that the respective rates requested are reasonable. From the affidavits it is evident that all of the defense attorneys involved in this litigation had several years of experience practicing in Florida. Upon review of the submitted affidavits, and exercising its own judgment, the court determines that the hourly rates recommended by the magistrate judge for attorney, law clerk and paralegal time are reasonable.

B. Reasonable Hours:

The next step in the computation of the lodestar is the ascertainment of reasonable hours. In determining reasonable hours the court must exclude from the fee calculation hours that were "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 433. A lawyer may not be compensated for hours spent on activities for which, using a cost benefit analysis, he or she would not bill a client of means. "Hours that are not properly billed to one's client also are not properly billed to one's adversary." *Sussman v. Salem, Saxon, & Nielsen P.A.*, 152 F.R.D. 648, 653 (M.D. Fla. 1994) *quoting* Copeland v.

Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc).

1. Trial Court Hours:

Having independently reviewed the affidavits of Defendants Britt, Bonk, and Tallahassee Community Hospital ("TCH"), the court determines that the hours recommended by the magistrate judge are reasonable. The court, however, has some concerns with respect to the documentation submitted by defendants Chokhawala and Moore in support of the hours claimed.

Defendant Chokhawala claims 72.5 hours for work related to his attorney's attempt to take the depositions of Dr. Peniston and Dr. Taylor. The hours requested by Defendant Chokhawala, however, are not itemized with respect to how many hours were spent on particular subject matters. Without this type of itemization, the court cannot determine whether any particular aspect of the work claimed is excessive or otherwise unnecessary.

Defendant Moore claims 112.10 hours of attorney and law clerk time at billing rates of $85.00 per hour for partner, $75.00 per hour for associate, and $45.00 per hour for law clerk. As discussed above, the hourly rates charged are reasonable. The hours claimed, however, are not itemized by individual time keeper and the court cannot determine which hours belong to which timekeeper. Although Defendant Moore's statement that the total amount of attorneys' fees requested were actually billed to the insurance carrier is an indication of reasonableness, such a statement in an of it self is an insufficient basis for the court to conclude that the fee requested is reasonable.

2. Appellate Hours:

TCH seeks appellate attorneys' fees in the amount of $21,813.00 for work before the Eleventh Circuit. TCH seeks compensation for 83.70 hours for attorney Davis and 125.50 hours for attorney Dean spent working on the appeal. The documentation in support of these hours is deficient. Specifically, the affidavit in support of these hours lump sums the 80.75 hours spent by attorney Davis and the 109.80 hours spent by attorney Dean under the general category of "Representation on Appeal." Although Defendant TCH has averred that the hours requested for the appeal were necessary, non-duplicative work, without further itemization as to how specific hors were spent on particular aspects of the appeal the court cannot determine whether said

hours were reasonable or whether they were excessive or otherwise unnecessary.

3. Expenses:

This court's May 6, 1991 order (document 396) also awarded Defendants reasonable expenses. All the attorneys have presented this court with requests for expenses and the magistrate judge has determined them to be reasonable. Upon independent review of the same, the court also finds that the expenses sought to be recovered are reasonable.

II. Conclusion:

Having considered the report and recommendation and all objections filed thereafter, the court determines that the report and recommendation should be adopted in part and remanded in part so that the respective Defendants can submit the documentation necessary for the court to conduct the required analysis.

Accordingly it is ORDERED:

1. The magistrate judge's report and recommendation is ADOPTED to the extent it is not inconsistent with this order of the court.

a. Defendant Britt is awarded attorneys' fees and expenses in the amount of $11,907.59.

b. Defendant Bonk is awarded attorney's fees and expenses in the amount of $4,770.65.

c. Defendant Tallahassee Community Hospital is awarded attorneys' fees and expenses in the amount of $18,493.66 for the work before this court.

2. With respect to Defendants Moore, Chokhawala and Tallahassee Community Hospital, this cause is remanded to the magistrate judge for further consideration. To the extent that this court has denied their requests for attorneys' fees the parties are directed to resubmit their respective fee applications and otherwise respond to the court's concerns noted herein.

DONE AND ORDERED this 3rd day of July, 1994.

WILLIAM STAFFORD, UNITED STATES DISTRICT JUDGE /s/

App. 26

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. TCA 85-7216-WS ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

REPORT AND RECOMMENDATION

On December 14, 1990, a report and recommendation was entered recommending in part that as a sanction Plaintiffs pay Defendants expenses, including attorneys' fees,

> for all work and expenses related to their attempts to take the depositions of Drs. Peniston and Taylor from June 18, 1990, to date, including without limitation attendance at the June 20, 1990, scheduling conference, relate to this issue, responses to all appeals of the magistrate's orders from June 20, 1990, to date, attempts to communicate with Plaintiffs as to this question, and the filing and litigation of the motions for sanctions and the responses to motions denied in this order.

Doc. 376, p. 61. The court adopted that recommendation and remanded for a determination of the amount. Doc. 396.

The following motions for attorneys' fees and costs were then filed seeking fees and expenses: Moore (docs. 406, 407, and 409); Tallahassee Community Hospital (docs. 408); Chokhawala (docs. 410, 414, and 415); Britt (doc. 411, 412, and 413); and Bonk (doc. 416). These motions are pending.

This court's judgment was affirmed by the Eleventh Circuit and certiorari denied by the Supreme Court. Docs. 435, and 443. The Eleventh Circuit granted a motion by the Tallahassee Community

Hospital for an attorney's fee on appeal through October 12, 1992, and remanded to this court for determination of the amount. Doc. 440. The Tallahassee Community Hospital has filed a motion and affidavits as to the amount. Doc. 442.

The stay of consideration of the pending motions for attorneys; fees was vacated when the mandate was received by this court. Doc. 439. That order, entered on April 19, 1993, provided that Plaintiffs could file responses to pending motions for attorneys' fees and expenses within 20 days. The order was mailed by the Clerk to Plaintiff Connie C. Reshard's last known address, 1333-A Pennsylvania Avenue, Washington, D.C. It was returned by "Mail Boxes Etc.", apparently a private mailing office, with a notice "return to sender, not at this address, no forwarding address." Doc. 441. That address was used by Plaintiff on November 2, 1992, when she filed in the Eleventh Circuit opposition to an award of appellate attorneys' fees. Doc. 442, ex. B.

Another order was then entered directing that the Clerk mail the order to Plaintiff Connie C. Reshard at 1825 Connecticut Avenue, N.W., No. 200, Washington, D.C. 20009, which was the address used by Tallahassee Medical Center, Inc., for service of its May 24, 1993, motion for award of appellate attorneys' fees. Doc. 444. That order was returned to the court with notification that Plaintiff was not at that address and had left no forwarding address.

A party has an obligation to the court to provide the court with changes of address. Local Rule 6(C) provides that failure to file a reply memorandum may be sufficient cause for granting the motion by default. In this case, Plaintiffs' default in response is due to the failure of Plaintiffs to provide the court with a current address. The court, therefore, has no other alternative but to adjudicate the pending motions in the absence of a response by Plaintiffs. **[Annotation: Plaintiffs filed preliminary objections on July 12, 1991, after the receipt of Defendants' Motions for Attorneys Fees. R10-420]**

Dr. Moore seeks attorney's fees and expenses in the amount of $9,949.85. Doc. 407. The claim is for 112.10 hours of attorney and law

clerk time at billing rates to the insurer of $85 per hour for partner, $75 per hour for associate, and $45 per hour for law clerk. The hours are not itemized and the court cannot tell which hours belong in which category. But the affidavit states that this amount was actually billed to the insurance carrier. The rates are reasonable when compared to the rates claimed by other attorneys. The number of hours are also not unreasonable for the litigation at issue. Thus, the fee requested, $8,969.50 is reasonable. The expenses claimed, $980.35, are also reasonable. Accordingly, it is recommended that the court award Dr. Moore fees and expenses in the amount of $9,949.85.

The Tallahassee Community Hospital was represented by William H. Davis. He spent 125.9 hours litigating the sanctions issues before the trial court, and seeks compensation at an hourly rate from $125 to $175 per hour. Doc. 408. A rate of $125 per hour is reasonable and is recommended. Another 25.95 hours of paralegal time was also expended for which the Hospital seeks compensation at $40 per hour for a total of $1,038.00. The paralegal rate is reasonable. The total hours claimed are also reasonable. Finally, expenses in the amount of $1,718.16 are claimed and are reasonable. It is recommended, therefore, that a total of $18,493.66 be awarded to the Tallahassee Community Hospital for expenses and attorney's fees for work before this court.

Dr. Britt seeks compensation for 43.9 hours at $125 for the work of James Truett, 30.45 hours at $125 per hour for the work of Richard B. Collins, 8.5 hours for the work of a "JBB" at an unknown hourly rate, and expenses in the amount of $2,613.84. Doc. 412. It appears that 6.5 of the hours worked by "JBB" duplicate hours spent by Truett at the same hearing. For that reason, and lacking support for payment at some hourly rate, it is recommended that these 8.5 hours be discounted. The remainder of the claim is reasonable. It is recommended, consequently, that the court award Dr. Britt a total of $11,907.59 as expenses and attorneys' fees.

Dr. Chokhawala has filed a claim for a total of $8,249.65 in fees and expenses for the work of Steven P. Seymoe. Doc. 415. While the hours (72.5) are not itemized, the hours expended are generally

reasonable when compared with other claims and this court's familiarity with the nature of the litigation. The hourly rate claimed, $100, is also reasonable. It is recommended that judgment be entered in the amount claimed.

Dr. Bonk has claimed expenses of $1,448.15, and attorney's fees for 44.30 hours at $75 per hour, for the work of Richard Smoak, for a total of $4,770.65. Doc. 416. The claim is reasonable and should be approved.

Finally, the Tallahassee Community Hospital seeks an appellate attorney's fee in the amount of $21,813.00 for work before the Eleventh Circuit. Davis spent 83.70 working on the appeal, and seeks a fee of $10,462.50 at $125 per hour. James J. Dean also worked on the appeal for a total of 125.5 hours and seeks a fee of $75 per hour for the first 2.3 hours, and $90 per hour for the rest, for a total of $11,178.00. The claim is reasonable and a fee in these amounts is recommended. This calculation of the fee is recommended instead of the alternative proposed since it contains only appellate hours.[1]

Accordingly, it is

RECOMMENDED that the Court enter judgment against Plaintiffs, Connie C. Reshard and Leroy Reshard, for attorneys' fees and expenses in the following amounts:

1. $9,949.85 in favor of David Moore.

2. $18,493.66 for work before this court, and $21,813.00 as appellate attorney's fees, for a total judgment of $30,306.66 in favor of the Tallahassee Community Hospital.

---

1 The second method claims an additional fee for work at the trial level. The Eleventh Circuit's mandate probably leaves it to this court's discretion to consider and approve that additional claim. Counsel would be adequately and reasonable compensated by the first method.

3. $11,907.59 in favor of Dr. Britt.

4. $8,249.65 in favor of Dr. Chokhawala.

5. $4,770.65 in favor of Dr. Bonk.

Within 15 days after being served with a copy of this report and recommendation, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

IN CHAMBERS at Tallahassee, Florida, this 27th day of July, 1993.

/s/

WILLIAM C. SHERRILL, JR., UNITED STATES MAGISTRATE JUDGE

App. 31

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. TCA 85-7216-WS ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

ORDER

Proceedings concerning award of attorney's fees and expenses were stayed pending Plaintiffs' appeal. Doc. 422. The mandate on the appeal has now been issued and is final, docs. 435 and 436, and the stay will be vacated.

Pending is a motion which the undersigned construes as a renewed motion of recusal. Docs. 420 and 421. A similar motion, doc. 404, was denied by Chief Judge Stafford on June 5, 1991. Doc. 405. The motion relies upon 28 U.S.C. §§ 144 and 455.

The motion pursuant is not sufficient pursuant to 28 U.S.C. § 144. *United States v. Alabama*, 828 F.2d 1532, 1540 [sic] Cir. 1987), U.S. 1210 (1988).[1] Since it is not sufficient and the same motion has already been denied by Chief Judge Stafford there is no need for the motion to be heard by a district judge other than Chief Judge Stafford. *Id.*

The standard for recusal pursuant to 28 U.S.C. § 455(a) is an objective one:

> "The test is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert denied*, __U.S.__, 109 S.Ct.

---

1 That statute requires a timely affidavit setting forth material facts stated with particularity that, if true, would convince a reasonable person that personal, as opposed to judicial, bias exists. *United States v. Alabama*, 828 F.2d at 1540.

> 2066, 104 L.Ed.2d 631 (1989). Ordinarily, a judge's rulings on the same or related case may not serve as the basis for a recusal motion. *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), *cert denied*, 480 U.S. 931, 107 S.Ct. 1566, 94 L.Ed.2d 759 (1987). The judge's bias must be personal and extrajudicial; it must derive from something other than that which the judge learned by participating in the case.

McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990), *reh. denied* 917 F.2d 570 (1990). Matters learned in a judicial capacity are not a basis for disqualification for personal bias absent evidence of pervasive bias shown by judicial conduct. *United States v. Sims*, 845 F.2d 1564, 1570 (11th Cir.), *cert. denied*, 488 U.S. 957 (1988); *United States v. Liteky*, No. 91-8577, September 28, 1992 [sic] (11th Cir. 1992). Since the facts alleged are legally insufficient for recusal, no evidentiary hearing is required.

Accordingly it is

ORDERED that:

1. The stay previously entered is VACATED.

2. Plaintiffs' motion to disqualify the undersigned, docs. 420 and 421, is DENIED.

3. Plaintiffs shall have 20 days from the date of entry of this order on the docket in which to file any further response to the filings already of record concerning Defendants' claims for attorneys' fees and expenses.

4. Defendants shall have 15 days from service of any further filings by Plaintiffs in which to file a response.

5. The Clerk shall refer this file to me on May 28, 1993, for adjudication of the amounts of attorneys' fees and expenses to be awarded.

DONE AND ORDERED this 19th day of April, 1993.

/s/

WILLIAM C. SHERRILL, JR., UNITED STATES MAGISTRATE JUDGE

App. 33

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3542
NON-ARGUMENT CALENDAR

District Court DOCKET NO. TCA 85-7216

CONNIE C. RESHARD; and LEROY RESHARD,
CO-Personal Representatives of the Estate of Minnie Lee Reshard on behalf of the Estate and certain survivors,

Plaintiffs-Appellants,

versus

DR. EARL BRITT; DR. GEORGE BONK; DR. PANKAJ P. CHOKHAWALA; DR. DAVID MOORE; TALLAHASSEE MEDICAL CENTER, INC., d/b/a/ Tallahassee Community Hospital,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.

Defendant.

Appeal from the United States District Court
for the Northern District of Florida

(September 30, 1992)

Before TJOFLAT, Chief Judge, KRAVITCH, and HATCHETT, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs file[d], pursuant to Eleventh Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHERED ORDERED THAT plaintiffs-appellants pay

to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 30, 1992
For the Court: Miguel J. Cortez, Clerk
By: /s/
[Karleen McNabl]

ISSUED AS MANDATE: February 26, 1993
ATTACHED WAS A BILL OF COST FOR APPELLEE TALLAHASSEE COMMUNITY HOSPITAL IN THE AMOUNT OF $56.62.

ORDER

PER CURIAM:

The issues appellant raises in this appeal are meritless. The district court committed no error, much less an abuse of its discretion, in (1) refusing to disqualify defense counsel; (2) refusing to grant the Plaintiffs default against the defendants; and (3) in dismissing plaintiffs' wrongful death actions with prejudice. Every finding of fact complained of is well supported by the record, and the court properly applied the law to each such finding.

AFFIRMED. {FILED ON SEPTEMBER 30, 1992}

App. 35

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 92-3542

REHEARING BY PANEL DENIED AND NO VOTE ON SUGGESTION OF EN BANC REVIEW
DATED: DECEMBER 23, 1992
[TEXT OF PRINTED FORM OMITTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3542

CONNIE C. RESHARD AND LEROY RESHARD,
Co-Personal Representatives of the Estate of Minnie Lee Reshard on behalf of the Estate and certain Survivors,

Plaintiffs-Appellants,

versus

DR. EARL BRITT, DR. GEORGE BONK, DR. PANKAJ P. CHOKHAWALA, DR. DAVID MOORE AND TALLAHASSEE MEDICAL CENTER, INC., d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

Defendants-Appellees,

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of Florida

BEFORE: TJOFLAT, Chief Judge, KRAVITCH, and HATCHETT, Circuit Judges.

BY THE COURT: **Filed 9/30/92**

Appellant's motion for review by the court of the April 14, 1992 and May 22, 1992 denial of her motion to settle the record and the inclusion of original audio tapes of transcripts in the record is denied.

App. 36

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

V.

DR. EARL BRITT, et al.,
Defendants.

TCA 85-7216-WS

ORDER

Filed May 6, 1991

/

In my order of April, 1991, all parties were advised that this court would construe plaintiffs' motion for reconsideration (document 378) as follows:

a) as plaintiffs' appeal of the magistrate judge's rulings on non-dispositive matters; and

b) as plaintiffs' objections to the magistrate judge's recommendations on case-dispositive motions.

In response, plaintiffs filed a few "comments" (document 392) in which they take issue with the way in which the court intends to treat their motion for reconsideration. In addition, plaintiffs filed their objections (document 394) to the magistrate's order, report and recommendation. Despite Plaintiffs' protestations to the contrary, the undersigned will not send any portion of the order, report and recommendation (document 376) back to the magistrate judge; their motion for reconsideration will be handled as set forth above.

The plaintiffs initially contend the magistrate judge erred in denying their motion to vacate findings of fact (document 344), their motion to strike the deposition of Plaintiff Connie Reshard (document 332) and their motion to strike defendants' notice of taking of depositions duces tecum (document 254) which were scheduled to take place July 17 - 18, 1990 in Washington, D.C. As the court has explained several prior occasions, a magistrate judge's order determining non-dispositive matters must only be set aside upon review if it is found to be clearly

erroneous or contrary to law. See 28 U.S.C. § 636(b)(1)(A); N.D. Fla. General R. 27(A). After reviewing plaintiffs appeal, the defendants' responses thereto (documents 380, 391, 393 and 395) and the magistrate judge's rulings on the motions at issue, the court finds that the order in question contained no portions which were in error or contrary to law.

The plaintiffs have also objected to the part of the document 376 which comprises its report and recommendations. All parties were furnished copies of the report and recommendation and were afforded an opportunity to file objections pursuant to Title 28, United States Code, section 636(b)(1). Several of the defendants have notified the court that they do not object to the recommendations contained therein. See documents 380, 391, 393 and 395. Having reviewed the report and recommendation and the parties' objections and responses thereto, the court has determined that the recommendations should be adopted.

Accordingly, it is ORDERED:

1. The magistrate judge's rulings on plaintiffs' motion to vacate findings of fact (document 344), motion to strike the deposition of Plaintiff Connie Reshard (document 332) and their motion to strike defendants' notice of taking depositions duces tecum (document 254) are AFFIRMED and plaintiffs' appeal of these matters is DISMISSED.

2. The magistrate's judge's report and recommendation (document 376) is adopted and incorporated by reference in this order of the court.

3. Defendants' motions for sanctions (documents 273, 279, 280, 290 and 297) are GRANTED and the following sanctions shall be imposed pursuant to Rule 37(b)(2)(c), Rule 41(b) and Rule 16(f) of the Federal Rules of Civil Procedure:

a) The complaint in this case is DISMISSED with prejudice, although the court will retain jurisdiction to award expenses and attorneys' fees as an additional sanction.

b) Plaintiffs' and their counsel shall pay to defendants their expenses, including attorneys' fees, for all work and expenses related to their attempts to take the depositions of Drs. Peniston and Taylor from June 18, 1990, to date, including without limitation attendance at the June 20, 1990, scheduling conference, responses to all motions filed by plaintiffs that relate to this issue, responses to all appeals of the magistrate judge's orders from June 20, 1990, to date, attempts to communicate with plaintiffs as to this question, and the filing and litigation of the motions for sanctions and the responses to motions denied in the magistrate judge's order.

4. The court REMANDS this case to the magistrate judge for entry of an order as to the amount of expenses and attorneys' fees which should be awarded.

DONE AND ORDERED this 6th day of May, 1991.

/s/
WILLIAM STAFFORD, CHIEF JUDGE

App. 39

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v.

TCA 85-7216-WS
ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

This case has been referred to the magistrate judge for entry of an order as to attorney's fees and expenses. Doc. 296. Accordingly, it is ORDERED that:

1. Defendants shall have 30 days from the date of entry of this order on the docket to file a motion pursuant to the order of remand setting forth by affidavit the time expended, a reasonable hourly rate as supported by affidavit from other attorneys in the community, and expenses.

2. Plaintiffs shall have 30 days from service of Defendants' motion to file a response and counter-affidavits to each motion.

3. Should any party want either oral argument or an evidentiary hearing, that party shall make such the request by motion showing good cause why this matter cannot be determined on motions and affidavits, and responses thereto, without oral argument or evidentiary hearing.

4. The Clerk shall return this file to me on or before July 15, 1991.

DONE AND ORDERED this 7th day of May, 1991.

/s/
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

App. 40

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,

Plaintiffs,

v. TCA 85-7216-WS
ORDER

DR. EARL BRITT, et al.,

Defendants.
_____/

This cause is before the court upon referral from the clerk's office today. On May 22, 1991, the undersigned, without waiting for defendants' responses, promptly granted plaintiffs' motion for enlargement of time in which to file motion to vacate, amend or alter the May 6, 1991 order (document 398). Two of the defendants subsequently responded to plaintiffs' motion, which crossed in the mail with the court's order. See documents 401 and 402. The defendants assert that this court is without authority to grant such an extension under Rule 6(b) of the Federal Rules of Civil Procedure.

Rule 6(b) specifically provides that courts may not extend the time for taking action under a Rule 59(e) motion to alter or amend judgment. It appears the 10-day time limitation in Rule 59(e) is one of the few limited periods which the court lacks the power to enlarge. See Pinion v. Dow Chemical, 928 F.2d 1522, 1525-26 (11th Cir. 1991); Wright v. Preferred Research, Inc., 891-F.2d 886, 890 (11th Cir. 1990). These decisions indicate how strictly the United States Supreme Court and the Eleventh Circuit have recently been interpreting the above Rules. Few exceptions are allowed.

The court is concerned that the plaintiffs may lose their right to

appeal through reliance on my order of May 22, 1991. Under the current trend, the Eleventh Circuit may, indeed, determine that this court was without authority to enlarge the time beyond the firm 10-day period for filing the motion to vacate, amend or alter final order, regardless of when such motion was filed or ruled upon.

The 30-day time frame in which the plaintiffs can appeal my May 6, 1991, order expires today. Although without power to grant plaintiffs' motion for enlargement of time to file a Rule 59(e) motion, this court would have the authority to grant a motion for an extension of time for filing a notice of appeal under Rule 4(a)(5) of the Federal Rules of Appellate Procedure. The circumstances presented here may constitute good cause for plaintiffs to file an untimely notice of appeal under this appellate rule.

Accordingly, it is ORDERED:

1. The court's order of May 22, 1991 (document 399) is hereby VACATED.

2. Plaintiffs' motion for enlargement of time in which to file motion to vacate, amend or alter May 6, 1991, order and other relief (document 398) is hereby DENIED.

3. Plaintiffs motion to vacate, to stay and disqualify a judge and magistrate (document 404) is hereby DENIED.

4. The clerk of the court is further directed to inform counsel for the parties of the contents of this order immediately by facsimile, telephone or by expedited delivery.

DONE AND ORDERED this 5th day of June, 1991.

/s/
WILLIAM STAFFORD, CHIEF JUDGE

App. 42

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD and LEROY RESHARD,
Plaintiffs,

v. TCA 85-7216-WS

ORDER

DR. EARL BRITT, et al.,
Defendants.

_____/

This cause is before the court upon the magistrate judge's order, report and recommendation (document 376). Parties customarily have 10 days from the date they are served with a report and recommendation in which to file written objections thereto with the district court. See 28 U.S.C. § 636 and N.D. Fla. General R. 27(B). However, in this case, the magistrate judge gave the parties 40 days in which to file objections to his findings. The magistrate judge also clearly explained that the failure to object to the report and recommendation prior to the district court's ruling thereon limits the scope of appellate review of actual findings.

A review of the file indicates that no such objections have been filed to date by any party. The court notes that plaintiffs have filed a motion for reconsideration of the magistrate's order, report and recommendation (document 378) to which Defendant Tallahassee Community Hospital has responded in opposition (document 380). Neither the Federal Rules of Civil Procedure, nor the Local Rules of this district provide for the filing of such a motion. Furthermore, the order, report and recommendation did not indicate that such a motion would be considered.

Accordingly, unless advised to the contrary within 15 days of the date of the docketing of this order, the court will construe the plaintiffs' motion to reconsider as both an appeal of the magistrate judge's findings which constitute his order on several non-dispositive matters, and as plaintiffs' objections to the remaining portions of

document 376 which contain his recommendations on case-dispositive motions. Furthermore, unless advised to the contrary within the same 15 days, the court will deem that all other parties have no objections or responses to any portion of the magistrate judge's order, report and recommendation.

DONE AND ORDERED this 10th day of April, 1991.

/s/

WILLIAM STAFFORD, CHIEF JUDGE

App. 44

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE C. RESHARD, et al.,
Plaintiff,

vs. TCA 85-7216-ws

EARL BRITT, et al.,
Defendants.

_____/

ORDER, REPORT AND RECOMMENDATION

All pretrial matters have been referred to the magistrate by order dated October 17, 1989. Doc. 171. A hearing, as rescheduled, was held on December 6, 1990. The hearing was scheduled for all pending motions, but oral argument was taken only as to the following motions:

1. Plaintiffs' motion to vacate finding of fact. Doc. 344.
2. Plaintiffs' motion to strike Defendants' notice of taking of depositions duces tecum, which were scheduled for July 17 and 18, 1990, in Washington, D.C. Doc. 254.

3. Plaintiffs' motion to strike deposition of Connie Reshard. Doc. 322.

4. Defendants' motions for sanctions arising from the Plaintiffs' failure to attend the depositions, as well as other matters. Docs. 273, 279, 280, 290, and 297.

In view of the court's rulings and recommendations on these motions, no argument was had upon pending motions concerning discovery and the motions for summary judgment.

I. Procedural status of this case [section omitted][contained a list of motions by the parties which were considered only to the extent mentioned immediately above]

II. Plaintiffs' motion to vacate findings of fact, doc. 344

This is a motion filed pursuant to Fed. R. Civ. P. 60(b) to vacate purported findings of fact in this court's order of June 14, 1990, doc. 220, which denied in part and granted in part Plaintiffs' motion to compel discovery, doc. 134. The reason that this order is denied is simple: the order of June 14, 1990, did not make binding findings of fact.

However, since the underlying assertions made by Plaintiffs are serious allegations of fact and have been made over and over again in this case, a more complete order is entered.

The initial complaint filed in this case contains the allegation that the Defendants destroyed medical evidence, a third x-ray of decedent's thyroid gland. The issue has often been asserted by Plaintiffs in various contexts. It has most recently been raised by document 344, "Plaintiffs' motion for vacation of finding of fact regarding Chokhawala Clinical resume and TCH's destroyed thyroid scan." Since this issue has been raised so often by Plaintiffs, beginning with allegations in the initial complaint, has been presented by Plaintiffs in such a confused way, and since Plaintiffs have on several occasions accused opposing counsel of misconduct as to this issue, this order, report and recommendation will first determine this motion.

On August 29, 1986, Plaintiffs moved to compel discovery and for sanctions.[1] Doc. 134. The first matter was a request for production directed to Defendant Tallahassee Community Hospital (TCH). That request sought the "contents of the third envelope of x-rays." TCH had responded that the envelope was empty because these x-rays were not taken. Plaintiffs's basis for the motion to compel was the following which is quoted in full: "Attached as Exhibit 'B' is the result of thyroid scan which document the existence of the procedure having been performed." (Emphasis added) Doc. 134, 3rd unnumbered page. Exhibit B attached to doc. 134 is a "laboratory report" which shows a thyroid panel (or profile), listing T3, T4, and T7, and what appear to be percentages. This was the only proof Plaintiffs submitted with this motion to compel. Thus,

---

[1] In September 1986, the court ordered Plaintiffs to obtain counsel and stayed further proceedings, including a ruling on this motion. After the appeal to the Eleventh Circuit, and when this case again entered the active discovery this year, this motion was determined by the court.

Plaintiffs by this document affirmatively represented to the court that the notations T3, T4, and T7 were a thyroid scan which Plaintiffs also represented in this motion to be a third set of x-rays.[2]

On May 11, 1990, TCH filed a motion to strike as to doc. 134. Doc. 201. In that motion, TCH pointed out that in doc. 134, Plaintiffs' motion to compel, Plaintiffs themselves stated that a thyroid profile is a thyroid scan, and that exhibit A to doc. 140, is a thyroid profile. Doc. 201, p. 7. Defendant TCH made the logical argument that if Plaintiffs claimed that a thyroid scan was missing and if they equated a thyroid scan with a thyroid panel, then their motion was baseless because they themselves had attached the thyroid panel results to their motion.

In Plaintiffs' objections to the magistrate's report and recommendation on Plaintiffs' motion to disqualify counsel, doc. 197, Plaintiffs again mentioned this issue in the context of exhibits which had been submitted to the court in that hearing. This time, Plaintiffs made different assertions of fact. Plaintiffs first asserted that the records show that Dr. Britt requested an "x-ray panel of the chest (thyroid panel)" on August 4, 1983, and show that this x-ray was performed on the same day. Plaintiffs then claimed that exhibits A-2 and A-3 "show that the x-ray was ordered, radioactive material injected in the decedent, as indicated by T-3, T-4 and T-7, a contrast material used for taking x-rays of the thyroid." (Emphasis by Plaintiffs) Doc. 197, p. 17. A similar assertion of fact was made on pages 24-25, including the following: "The injection of radioactive material is injected at the time the x-ray is to be taken so that the picture will be visible." (Emphasis by Plaintiffs.) In short, Plaintiffs by this document claimed as a matter of fact that the notations T-3, T-4, and T-7 represented radioactive material injected into the decedent to make an x-ray visible. This was false, as Defendants proved in their response.

---

[2] Plaintiffs made the same representation in doc. 140, page 3, and exhibit A attached.

On May 23, 1990, TCH filed a response to Plaintiffs' objections to the magistrate's report and recommendation on Plaintiffs' motion to disqualify counsel. Doc. 210. Again TCH pointed out that T-3 and T-4 refer to two hormones, and that T-7 is the free thyroxin index," which is the multiplication of the values for T-3 and T-4. Attached to the response of TCH is exhibit B, a page from a medical glossary, and exhibit C, apparently a page from a medical text, both of which fully support TCH in this observation. TCH argued with what now appears to have been complete justification that counsel for Plaintiffs failed to make a proper Rule 11 inquiry before asserting that T-3, T-4, and T-7 were radioactive material injected into the decedent to make an x-ray visible. Id., p.9.

The court will now turn to what happened with document 134, Plaintiffs' motion to compel. On June 14, 1990, the court denied Plaintiffs' motion to compel, doc. 134, to the extent that it sought what Plaintiffs' have called the missing third x-ray. The court noted that the only proof[3] that such an x-ray previously existed was attachment B to doc. 134 (which is clearly labeled a thyroid panel or profile). The court found that this exhibit had not been explained in the motion by the Plaintiffs and appeared on its face to be the results of chemical tests rather than a photographic study. Doc. 220, p.3.

This, therefore, brings us to Plaintiffs' pending motion to vacate a finding of fact. Doc. 344. The motion was filed pursuant to Fed. R. Civ. P. 60(b) and seeks to have vacated "findings of fact" in the order entered June 14, 1990, doc. 220, denying Plaintiffs' motion to compel, doc. 134. In this motion, Plaintiffs assert that counsel for TCH deliberately misled this court asserting in his response to Plaintiffs' objections regarding the magistrate's report and recommendation on the motion for disqualification of counsel that T-3, T-4, and T-7 constituted a thyroid scan or x-ray.

As discussed above, Plaintiffs' accusation that counsel for TCH deliberately misled this court is false, contrary to the written record in this court, and malicious accusation by Plaintiffs' counsel. Counsel for TCH clearly made no such claim. That Plaintiffs' counsel would accuse him of deliberately attempting to misled this court by this accusation is one of

---

[3] The court can only adjudicate questions based upon evidence submitted, and this is all that Plaintiffs submitted with this motion.

many examples of Plaintiffs' counsel's vindicative abuse of the adjudicative process, a matter which will be thoroughly discussed ahead. It was this court, not Defendant TCH's counsel, that found that Plaintiffs only evidence of the existence of a thyroid scan or x-ray was the results of a thyroid panel, and because Plaintiffs had failed in their proof of this issue, the motion to compel was denied. Doc. 220, p.3.

At the hearing on December 6, 1990, and now after a painstaking search of the entire record to try to understand what Plaintiffs' proof is as to the thyroid scan question, the court now understands what Plaintiffs must mean. That understanding has occurred not because Plaintiffs have explained their argument. Indeed, as discussed above, Plaintiffs have obscured their legitimate argument with false statements of fact and malicious accusations against opposing counsel.

The argument is simple, and could have been explained by Plaintiffs in their motion to compel, doc. 134, but was not. The argument follows from exhibits submitted in the hearing on the motion to disqualify counsel. See doc. 183. Exhibit A-4 is a document entitled "physician's orders" for August 4, 1983, and indicates that the third test to be done (after the T-3, T-4, and T-7 test was a "thyroid scan." The parties are in complete agreement that a thyroid scan is a radiological study of the thyroid done by injection of radioactive material into the body and use of an x-ray to create a photographic image.

The parties are also in complete agreement that pursuant to this order an envelope was created to contain this x-ray.{because the x-ray was performed and then destroyed} Plaintiffs asserted orally at hearing that the date August 4, 1983, was entered on the envelope and then stricken and August 5, 1983, entered. Plaintiffs have never offered this envelope as evidence, however.) Exhibit A-6, at the bottom, indicates that an x-ray was scheduled to be done on August 5, 1983. Exhibit A-8, nursing notes for August 5, 1983, show that the patient went to x-ray via wheel chair at 10:00 A.M. and returned at 11:30 A.M. Finally, on another page of the physician's order there is a nursing note dated August 4, 1983, (not August 5th) with a temperature of 24 degrees

signed by M. Pace, R.N. Directly beside that is what appears to be a pre-printed sticker that says: "X-RAY COMPLETED. MAY EAT.'

Plaintiffs contend from this evidence the envelope contained the third x-ray. Defendants contend the x-ray was never taken because the decedent died before it was taken.

From a review of these exhibits it is now concluded that Plaintiffs have some evidence from which a permissible inference could be drawn that a third x-ray may have been taken.

Plaintiffs have not, however, proved that Defendants in fact have this x-ray and can produce it. {Note: Defendants have offered no evidence that the x-ray was not taken we have all been to the hospital or lab, a file of an x-ray is not created for a later date without a written notation.} While a jury could infer that such an x-ray may have been completed, this court cannot order Defendants to produce that which they say does not exist and that which Plaintiffs have not shown is in their possession now.

Further, there is no need for the court to vacate a "finding of fact" as to this matter, since the order in which this question was discussed was only a discovery order.

Plaintiffs also seek by the motion to vacate a purported finding fact concerning the existence or non-existence of Defendant Chokhawala's typed clinical resume of treatment of the decedent. Plaintiffs claim in this part of the motion that in doc. 220 "the court found that only one document of Dr. Chokhawala's treatment of decedent existed, the handwritten consultation sheet." Doc. 332, third unnumbered page. Plaintiffs then claim their is a second clinical resume which has not been produced.

Like other matters asserted in this case, Plaintiffs allegations as to what the court "found" in doc. 220, are false. And like all that has been set forth above, after running rabbit trail through the documents, the falsity of the assertion is eventually discovered. The "finding" that the Plaintiffs seek to have vacated was in doc. 220, which was simply a denial of Plaintiffs' motion to compel discovery, doc. 134. The court's order is only as broad in making a "finding" in this regard as the issue and proof presented by Plaintiff in doc. 134. In doc. 134, Plaintiffs in part sought to compel an answer to interrogatory 5 to Dr. Chokhawala. Plaintiffs alleged in their motion that Dr. Chokhawala's response was to

have attached a copy of a consultation report which Plaintiffs then attached to their motion to compel as their exhibit D to doc. 134. Plaintiffs' basis for the motion to compel is quoted in its entirety:

Plaintiffs comments:

This document had been previously submitted, but Plaintiffs could not read for clarity. This is a request for a statement which has not been provided. This question remains unanswered.

In short, the Plaintiffs presented no evidence that there was another document. The court made no finding of fact that another document did or did not exist under these circumstances. Doc. 220. That left the issue of the ability of Plaintiffs to read exhibit D, which is handwritten. The granted the motion to compel, and ordered Defendant Chokhawala to provide Plaintiffs with a typewritten version of that handwritten document, as well as what 220 does not contain findings of fact as asserted by Plaintiffs, and since that order is not intended to make binding findings of fact, the motion to vacate findings of fact will be denied.

III. Findings of fact as to Defendants' motions for sanctions, doc. 273, 279, 280, and 297

Since these motions seek the sanction of dismissal with prejudice, the motions are case-dispositive. Consequently, these findings of fact and the conclusions of law which follow in section IV constitute a report and recommendation as to these motions. In the course of the findings of fact, the basis for orders determining Plaintiffs' motion to strike Defendants' notice of taking of depositions duces tecum, doc. 254, and Plaintiffs' motion to strike deposition of Connie Reshard, doc. 322, will be stated.

These findings of fact are based upon documents filed in this case, answers to interrogatories, transcripts of depositions, orders entered by this court, affidavits, and statements made to this court by counsel for the parties in hearings before this court.

The initial complaint in this case was filed on July 29, 1985, alleging claims for damages against the Defendants for health care of Plaintiffs' mother who died on August 6, 1983. Doc. 1. Plaintiffs initially proceeded without attorneys as pro se litigants. Plaintiffs Connie

Reshard and Leroy Reshard are now represented by Plaintiff Connie Reshard, who is an attorney.

In the early discovery stages of this case there were intimations of the problems that would later surface to impede the progress of this case. On June 26, 1986, the court held a discovery conference. At that time, the centerpiece of the evidence in controversy in this case, certain original x-rays taken by Defendants of the decedent, were in the possession of Plaintiffs brother. The court ordered the Plaintiffs to return those x-rays to the Defendant hospital by July 7, 1986. Doc. 89.

Plaintiffs filed a motion to reconsider the order to return the x-rays, asserting that the court could not order them to return the x-rays because the x-rays were not in their possession and because Plaintiffs generally claimed they had no control of their brother, James Reshard, who is not a party to this suit who had the x-rays. Docs. 96 and 85. Plaintiffs presented no facts from which the court might reasonably have concluded that James Reshard was beyond the persuasion of Plaintiffs. Indeed, Ms. Reshard's affidavit on the subject that she had 'seen and inspected the original x-rays," giving rise t the inference that the x-rays were entirely within her control. Doc. 85 {not true}

In denying this motion for reconsideration, this court patiently noted that Plaintiff Connie Reshard failed to observe that the court ordered her[4] to return the x-rays. Further, this court noted that Plaintiffs made no showing of a good faith effort to obtain the x-rays from James Reshard, and presented no credible facts to prove that Plaintiffs for some reason could not get the x-rays from their brother. Since these x-rays constituted the central evidence{******} in this case, critical to both sides, Plaintiffs' behavior was plainly unfair and contrary to fair resolution of the issues at stake herein. {Plaintiff C. Reshard had received a copy of the x-rays from J. Reshard. She reproduced at her expense a copy of the chest x-rays when requested by counsel for Defendant Bonk on July 7, 1986. Surely the x-rays were just as protected in the hands of Plaintiffs and in the hands of TCH} The motion for reconsideration was

---

[4] Plaintiff Connie Reshard's failure to listen to this court when ordered to do something necessary to move this case along to a fair and just conclusion, and her willful distortion of the plain words of this court's orders, has, as will be seen, continued unabated throughout the unfortunate history of this case.

denied on August 15, 1986. Doc. 11[5]

By notice filed July 24, 1986, doc. 97, Defendants scheduled the two Plaintiffs and other non-party witnesses for deposition on August 7, 1986. On August 6, 1986, and without notifying opposing counsel,[6]{not so notice was sent to Attorney William Smith by Federal Express two days before the scheduled event, since he was consolidating the scheduling process for all defendants counsel. This means that all defendant counsel had advance notice.} Plaintiffs filed a motion to stay the depositions of Plaintiffs (and the others). Doc. 107. The motion had been served by mail on August 4, 1986. Plaintiffs' motion failed to contain a certificate that Plaintiffs conferred with opposing counsel before filing the motion as required by Local Rule 6(B), and no such certificate was thereafter filed. Defendants asserted they were not notified before the motion was filed, doc. 114, p. 3, and it is concluded that this is true, since Plaintiffs failed to file a certificate of compliance with Local Rule 6(b).

Although the court had not granted such a stay, Plaintiffs failed to appear for the depositions on August 7, 1986, thereby unilaterally quashing the notice of depositions by their own actions.

The seriousness of this obstruction of the depositions must be evaluated in light of the objections raised in the motion for the stay. One objection to the depositions was that the non-party witnesses had not been subpoenaed. This objection was baseless because Plaintiffs lacked standing to assert this issue on behalf of these persons. The other basis for objecting to the depositions related to the Plaintiffs themselves. Plaintiffs contended that their thoughts about the case were protected by the work product privilege.[7] Doc. 107. This objection

---

[5] Even after the court's second order concerning these x-rays, Plaintiffs continued to file objections. Doc. 140 {merely a notation for the record.}

[6] As will be seen, subsequent events now show that the timing of the motion and the failure to notify opposing counsel was intended by Plaintiffs to obstruct discovery.

[7] Plaintiff Connie Reshard did not represent herself and Plaintiff Leroy Reshard as an attorney at this stage of this case. Both were pro se Plaintiffs at this time. Ms. Reshard entered her appearance as counsel for herself and for Leroy Reshard after the appeal to the Eleventh Circuit.

similarly was improperly used to block the depositions. Setting aside for the moment the question of whether the interests protected by the attorney work product rule have any existence when the Plaintiffs are not represented by an attorney, Plaintiffs are not represented by an attorney, Plaintiffs are parties and a number of matters within their personal observation and memory (such as economic loss from the death of their mother as well as matters which they personally witnessed) would have been proper for inquiry upon deposition even if their strategic thoughts about trial were protected by the work product rule. Plaintiffs had no order from this court canceling or staying the depositions, and should have interposed their work product argument to specific questions at the depositions.[8]

In summary, the objections to the depositions were baseless, improperly interposed, and interposed unannounced to the opposing parties. As a consequence, the failure of Plaintiffs thereafter to attend the depositions constituted an unreasonable unilateral obstruction of discovery.

On August 15, 1986, this court entered an order regarding discovery. While the time for responding to the motion to stay the depositions had not yet expired, and thus no ruling was entered then as to this motion, the court noted its concern that the Plaintiffs might be "slowing the progress of this litigation,"[9] and ordered that no further extensions would be permitted. Doc. 111.

On September 2, 1986, the court granted Defendant Britt's motion that Plaintiffs be required to obtain counsel and stayed all proceedings until Plaintiffs could obtain counsel. Docs. 144 and 145. Plaintiffs took an interlocutory appeal from this order, doc. 147. In a divided decision, the Eleventh Circuit initially reversed this court's order.

---

[8] The appeal with respect to the pro se status of Plaintiffs then occurred, and the motion for protective order was not ruled upon until that appeal concluded. It was denied by an order dated April 12, 1990, doc. 184, which noted that the work product objection could not be raised as a blanket obstruction to depositions, but had to be asserted with respect to specific questions asked at the depositions. That order also ruled that Plaintiffs had no standing to object to the lack of subpoenas for non-party deponents. A motion for sanctions, doc. 115, was also denied.

[9] In addition to the objections to the depositions, in the initial stages of the case, Plaintiffs sought numerous extensions of time to conduct discovery. Docs. 58, 59, 64, 100.

Reshard v. Britt, 819 [F.2d] 1573 (11th Cir. 1987). The case was reheard by the Eleventh Circuit en banc, and when the en banc court divided equally on the issue, this court's ruling was affirmed as a matter of law. Reshard v. Britt, 839 F.2d 1499 (11th Cir 1988). Doc. 160.

Subsequently, it appearing that Plaintiff Connie Reshard had been admitted to the bar of Pennsylvania, Ms. Reshard moved for admission to this court pro hac vice to represent herself and Plaintiff Leroy Reshard, doc. 161, and the court granted her motion. Doc. 165.

All pretrial matters were then referred to the magistrate. Doc. 171.

One pretrial matter was a motion to disqualify counsel for TCH. After an evidentiary hearing on April 12, 1992, a report and recommendation was made to Chief Judge Stafford recommending that the motion be denied. Doc. 186. That report and recommendation was adopted by the court. Doc. 287.

A second group of pretrial matters pending at that time was the pending motions with respect to discovery. On April 12, 1990, an order was entered denying Plaintiffs; motion for a protective order and sanctions with respect to the depositions which had been scheduled but not held in August 1986. The parties were ordered to reschedule these depositions to occur within 30 days, a period which subsequently was extended. Do. 184, p.3; doc. 194.

A scheduling order was then entered, doc. 185, and as extended, the deadline for discovery was set for August 17, 1990. Doc. 194. That scheduling order had specific provisions concerning scheduling conferences and discovery of expert witness opinions which will be discussed ahead.

As to Plaintiffs' expert witnesses, in June 1986, Defendant Britt had propounded interrogatories to the Plaintiffs, and interrogatory 8 sought information a "each expert witness you have retained or intend to use at the trial of this cause." Interrogatory 8 asked in part for the "area of expertise" and "substance of opinions" of expert witnesses. Doc. 290, exhibit A. Plaintiffs responded to these interrogatories in July 1986. The responses was sworn to by Plaintiff Connie Reshard. Doc. 191, exhibit B-13. The response identified Drs. Reginald Peniston and Robert Taylor, both of Howard University Hospital, as experts retained by Plaintiffs or who Plaintiff intended to use at trial. Dr. Peniston's expert

opinion was attached and signed by Dr. Peniston. Doc. 191, exhibit B-14 and 15. As to the "area of expertise" and "substance of opinions" of Dr. Taylor, Ms. Reshard stated under oath:

The substance and areas of expected expertise are failure to properly diagnose the dissection and to properly read the chest x-rays, the administration of drugs, established standards of care for the diagnosis and management of patient with dissecting aorta, and the standards of care for a hospital.

Doc. 191, exhibits B-7 and B-13

Over the course of a number of months prior to June 1990, the parties and the court had difficulty reaching Ms. Reshard by telephone on several occasions. Docs. 167, 180, 193. On June 11, 1990, Defendants filed a motion for a scheduling conference. Doc. 218. In that motion, Defendants stated that they had been trying to schedule the depositions of Plaintiffs' two expert witnesses since May 2, 1990, but had been unsuccessful. Defendants stated that they had attempted to communicate with Plaintiffs' counsel by letters and by telephone, but that repeated telephone messages left on Plaintiffs' counsel's telephone recorder had resulted in no returned telephone calls. Finally, Defendants stated that they had requested that Plaintiff's counsel provide them with a day-time telephone number at which she could be reached, but she had refused. Doc. 218.

At this point it should be noted that paragraph (2) of this court's scheduling order, doc. 185, clearly stated that upon motion, a discovery conference will be scheduled. Paragraph (5)(h) of the same order clearly provided that upon request of any party, a scheduling conference will be held.

On June 14, 1990, the court entered an order which ruled upon all then pending discovery disputes. It was observed in that order that the time for filing a response tot he motion for a scheduling conference had not yet expired. But as set forth above, it was the court's intent to monitor this case closely and to move it along through discovery without further unnecessary disputes. In that order the court wrote in part:

This court will not tolerate further disparaging personal remarks between counsel.

* * *

Sanctions will not be awarded as a result of this round of discovery

problems because some of the problems seem to have occurred some years in the past. Since this case is now in active discovery and will be closely monitored by the court, it is hoped that sanctions will not be needed to keep this case on track.

Doc. 220, pp. 7-8. As to the motion for scheduling conference, the court advised the parties:

While the time for are [sic] response to this motion has not yet elapsed, the court will ordinarily set a telephone hearing or conference whenever a party in this case demonstrates an apparent need, and will not await a response from the opposing party. A scheduling conference by telephone will be set for 10:00 A.M., June 20, 1990.

Id., p.8.

The scheduling conference was set for June 20, 1990, at the request of the Defendants because the Defendants, represented by numerous counsel, stated in their motion that they were available to conduct the depositions on July 17 and 18, 1990, because it was obviously difficult for this number of attorneys to find a mutually acceptable date for these depositions, and because the discovery deadline was approaching and there was a need to have a conference to establish firm deposition dates acceptable to all parties.

Because there was the possibility that Plaintiff's counsel could not be present for the scheduling conference on June 20, 1990, and in an effort to reduce needless delay involved in the filing and consideration of a motion to continue, on June 18, 1990, the magistrate instructed the Deputy Clerk immediately to call Plaintiffs' counsel to advise her of the contents of this order. The Deputy Clerk did so, was unable to reach Plaintiffs' counsel but left a message on her telephone answering machine. The telephone conference was held as scheduled, but Plaintiffs' counsel failed to answer her telephone and was not present for the conference.

Less than one hour after the telephone conference had ended, the court received doc. 223 from Plaintiffs. The letter was mailed on June 18, 1990, and states that counsel for the Plaintiffs had that date received the court's order of June 14, 1990, which scheduled the conference for June 20, 1990, and was responding to the magistrate's telephone call (the call placed on the magistrate's behalf by the Deputy Clerk) regarding the June 14, 1990, order. Plaintiffs' counsel then stated she was "absolutely unavailable" for a telephone hearing on June 20, 1990.

In short, on June 18th Plaintiffs' counsel knew that a telephone conference was to be held two days late, knew that five other lawyers for Defendants would be present for the conference, knew that the Deputy Clerk of this court had called her to be sure she knew opposing counsel or this court to move for a continuance or tell everyone she would not answer her telephone when the telephone conference operator called.

The letter, doc. 223, was treated as a motion to continue the conference and was denied as untimely filed. Doc. 224. More important, in an effort to stop this behavior on the part of Plaintiffs' counsel, the court found:

Counsel for the Plaintiffs has missed an important procedural point. When a court sets a hearing or a conference, it has not ruled upon the merits of the matters before it. It simply wishes to set a time to hear the controversy. The reason that this court asked the Deputy Clerk to call Plaintiffs' counsel was to be sure she was aware that the court had set the scheduling conference on short notice. As an officer of this court, counsel has the responsibility to this court and other counsel to remain in communication so that this case may proceed efficiently, without undue expense to either side. Since counsel for the Plaintiffs knew that the scheduling conference was set for June 20, 1990, it was counsel's responsibility to use the same means of communication the court had used, the telephone, to let either the Clerk or my secretary know that she was not available for the June 20th conference. Had she done so, the time that Defendants' counsel and this court spent preparing for and attending the telephone conference would have been avoided. (Footnote omitted.) Doc. 224.

As a result of the scheduling conference, the court entered an order to the parties that required that the depositions be held on July 17 and 18, 1990. Although it would have been fair to Defendants for the court then to have ruled that Plaintiffs had, by their behavior, forfeited all right to complain about the depositions of their experts, it nonetheless left open the opportunity for Plaintiffs to state good cause why these depositions should not take place on those dates. But as warned before in the order quoted above, it was the court's intent to monitor discovery closely. It was intended by this order to leave no doubt in Plaintiffs' counsel's mind as to what was expected. Thus, thus, court ordered the following:

The depositions of the Plaintiffs' expert witnesses, Drs. Peniston and Taylor, shall be conducted on July 17 and 18, 1990. The place and times for these depositions shall be set by the Defendants through normal procedures, including the use of deposition subpoenas. If the Plaintiffs have good cause that these depositions should not take place on the above dates, such good cause must be presented to this court by a motion filed, it must provide the Defendants with every date on which the Plaintiffs' experts will be available for deposition within the discovery period. (Emphasis added) Doc. 224.

It was now obvious to the court that one of the problems not only by the Defendants, but now by the court itself, was the inability to contact Plaintiffs' counsel by telephone during the active discovery period. Consequently the following order was also entered:

By July 2, 1990, Plaintiffs' counsel shall file with the court a telephone number where she can be reached either in person or by a message delivered to her by another person during the hours from 9:00 A.M. to 5:00 P.M. Monday through Friday of each week. It is not the intent of the court that the Plaintiff be required to be required [sic] to respond immediately to the caller, but to get the telephone message promptly during the day and to return the telephone call before 5:00 P.M. that same day, absent good cause for not doing so. Doc. 224.

The next day, June 21, 1990, Defendants, through counsel for Defendant Moore, filed and served a notice of taking the depositions of Plaintiffs' experts, Drs. Reginald L. Peniston and Robert Taylor. The original of the notice filed with the court contained the signature of counsel for the Defendant Moore on the certificate of service but not at

the place provided at the end of the notice but before the certificate of service. The certificate of service, however, clearly identified the notice of taking depositions to be the one for Drs. Peniston and Taylor. Thus, there was no ambiguity as to what was intended by counsel for Dr. Moore. Doc. 225.

At this point the provisions of this court's scheduling order concerning discovery from expert witnesses is pertinent to the ensuing events. The scheduling order, entered on April 17, 1990, ordered the following with respect to experts:

(3) Expert Witnesses. The identification of expert witness and their opinions is commonly the source of most pre-trial delay. In order expedite the discovery process, and in addition to the requirements of Rule 26(b)(4)(A), each party shall submit to the opposing party at the earliest opportunity a list of all expert witnesses anticipated to testify at trial. The list shall also include the address and area of expertise of each expert witness. A copy of each expert's written opinion with supporting facts and grounds, or a written summary thereof, shall be attached to the list. Although no time deadline is set herein for submission of this information, the parties are directed to do so sufficiently in advance of the discovery deadline set in paragraph (1) of this order so depositions may be scheduled and taken before the discovery period ends .... The parties are reminded that discovery depositions of experts expected to be called as witnesses at trial are subject to the provisions of Rule 26(b)(4)(A)(ii).

Also relevant to the ensuing events is Local Rule 6(B) which provides with respect to motion practice in this district:

(B) Counsel Conference Required. Counsel for the moving party shall confer with counsel for the opposing party and shall file with the court at the time of filing a motion, or within three (3) days thereafter, a statement certifying that he has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised and the results thereof .... (Emphasis added)

The clear intent of Local Rule 6(B) is that counsel for the moving party must in good faith try to resolve issues by conference with counsel, not

by filing motions, and that such conferences should occur before the motion is filed, absent some good cause for failing to do so.[10]

On June 27, 1990, Plaintiffs filed a motion to quash the taking of the depositions from Plaintiffs' expert witnesses and a motion for a protective order. Doc. 228. The gist of this motion was that Defendants had not complied with Rule 26(b)(4)(A(ii) because they had not obtained this court's permission to take the depositions before filing the notice.[11]

Plaintiffs' counsel, Ms. Reshard, who resides in Washington, D.C. was in Tallahassee, Florida, for her own deposition on June 27, 1990, the day the motion to quash was filed. Given the problems of scheduling hearings in this case and the need to keep on the discovery schedule, a hearing upon Plaintiffs' motion to quash the expert depositions was scheduled for the next day. Before turning to what happened at the hearing on June 29, 1990, however, the court must review what Ms. Reshard testified to under oath about Plaintiffs' expert witnesses at her deposition the day before. But before doing that, Plaintiffs' motion to strike Ms. Reshard's deposition, doc. 322, must be discussed. Plaintiffs' counsel objected to consideration by this court of her deposition because she had not reviewed the transcript to note errors by the court.* This motion was taken up at the hearing on sanctions on December 6, 1990, and was then orally denied. Ms Reshard did not go to the court reporter's office to review the transcript. Counsel for Defendants represent that the court reporter sent a letter to Ms. Reshard advising her that she should come to review the transcript, but that the letter was returned to the court reporter unclaimed. Defendants thus sent Ms. Reshard a copy of her own deposition for review. By the date of the hearing, December 6, 1990, Ms. Reshard had been in possession of a copy of her deposition for more than 30 days and thus had more than 30 days to review that copy to find errors, if any.

---

[10] Additionally, counsel for the moving party must file a written certificate as to those conferences with the motion or within three days thereafter.

[11] The prior filing of a motion to take the depositions by Defendants, followed by a court order granting the motion, is the only part of the rule argued in this motion. Plaintiffs did not mention the question of payment of expenses of the deposition and it can only be concluded that the issue of the expert witness fee was of no concern to Plaintiffs when the motion was filed. At the hearing the next day, the court raised this question sua sponte and ordered Defendants to pay the expert fees involved with these depositions.

She had by that time filed nothing with the court reporter or this court as to alleged errors. Therefore, all of the safeguards provided by Fed. R. Civ. P. 30(e) were satisfied. For this reason, the motion to strike this deposition was and is denied.

In her deposition, Ms. Reshard was asked if Drs. Peniston and Taylor had agreed to testify at trial. She evaded this question for several pages of transcript. Doc. 301, pp. 110-113. Finally she testified: "I told you that I have their authorization to submit their names to be used at trial." (Emphasis added.) With respect to Dr. Taylor, Ms. Reshard also testified that her answer to Defendants' interrogatories as to the substance of his expert opinion came from Dr. Taylor. Doc. 301, p. 161.

At the hearing on June 29, 1990, the court began by advising the parties that a hearing had been set immediately because it was felt that the discovery problems could be alleviated by having the parties meet together rather than continuing to pull further and further apart in accomplishing discovery.[12] T 7. The court stated that the motion to quash had been read, that no argument was needed, but that information was needed to reach a just determination of the question of expert witness depositions. The court's intent was to give Plaintiffs a full opportunity to put before the court every objection they might conceivably have to the expert witness depositions so that these objections could be speedily ruled upon so that both sides would not spend needless time and money on this issue.

Questions were then directed to Ms. Reshard by the court. In response to initial questions, Ms. Reshard stated that she intended to call Drs. Reginald Peniston and Robert Taylor as experts at trial, and that she had identified these experts as early as 1986. T 8, lines 8-14, 18-22.

With respect to the question of requiring Defendants to file a motion to take the depositions of these experts, Ms. Reshard acknowledged that she had sent several letters to counsel for Defendant Moore, Ms. Andrews, concerning these depositions. These letters are attached to Defendants' motion for a scheduling conference to set dates for the deposition of Plaintiffs' expert witnesses. Doc. 218 On May 17,

---

[12] The transcript of that hearing is doc. 227, hereafter T followed by the page number.

1990, Ms. Reshard wrote to Ms. Andrews, and the bottom of this letter, Ms. Reshard wrote: "Regarding the experts, please give me some idea of the times you prefer, and I will contact them and let you know." T 11-12. Ms. Reshard wrote Ms. Andrew again the next day as to her expert witness depositions stating "I will be happy to take any proposed dates and relay them to the witnesses and we will let you know what dates are okay." A third letter was sent by Ms. Reshard to Ms. Andrews on June 4, 1990, in which she acknowledged that Defendants had set July 17 and 18, 1990, as dates for these depositions, and asked that she be assured that these dates were scheduled on Defendants' counsels' calendars before she confirmed them with herself and her experts.

In short, from May 17, 1990, through June 4, 1990, Ms. Reshard said nothing of requiring Defendants to file a motion for permission to depose these experts. Instead, she behaved as if the only issue between the parties was when to have the depositions.

The court thus asked Ms. Reshard whether an any time before she filed her motion to quash the depositions she had informed Defendants that she would insist that they file a motion for the said court's permission to depose her experts. She said no. T 14, lines 15-18. She explained that she was not going to tell them they were not doing it correctly, and that "[w]hen the point in time came and they didn't do it correctly, I was going to advise them that it requires a court order." T 14, lines 20-23. The court asked what she meant by "the appointed time," and Ms. Reshard said: "Well, once the proposed dates were clear and there was nothing forthcoming shortly thereafter within days of a motion, I was going to advise her that she hadn't raised these issues which complied with the rule and to expect that we would object." T 15, lines 7-11.

In short, Ms. Reshard's plan was to require five attorneys for Defendants to set aside two days on their calendars, schedule the depositions, make travel plans from Tallahassee to Washington, , D.C. and then she would file her motion to quash, demanding a motion from Defendants and an order from this court that the depositions be allowed.

Ms. Reshard was then asked that if her objection to the depositions were satisfied, that is, if Defendants filed a motion, and if the court granted the motion and ordered Defendants to pay the expert witness fees, what other objections would she have to the depositions. Ms. Reshard said she did not then know of any other objections, but made it plain that she would research and attempt to come up with. (This is not precisely what she said, but is the practical effect of her answer.) T 16, lines 24-25, T 17, lines 1-25, T 18, lines 1-18.

Plaintiffs were on notice by the scheduling order that the court would expect the parties to have the opportunity to depose one another's experts. Despite the admonitions of Local Rule 6(B) that the moving party confer in good faith with opposing counsel to resolve issues, Plaintiffs' counsel failed to tell Defendants that she would insist that they strictly follow Rule 26(b)(a)(A)(ii) by filing a motion for permission to depose Plaintiffs experts. Instead, she demanded that five opposing attorneys set aside two days on their calendars, not including travel time, and make their travel plans, and then she intended to file her motion. When the motion was filed, the only grounds that stated for relief was that Defendants had not filed a motion.

At the June 29, 1990, hearing, the court deferred adjudication of the question whether Plaintiffs' motion to quash was filed in bad faith. Instead the parties were told that the court's interest was simply to insure that both sides had a fair opportunity for discovery. T 19, line 25, T 20, lines 1-25, T 22 lines 20-23, T 50 lines 17-25, T 51 lines 1-3. The court also stated at the June 29, 1990, hearing that it did not want to determine who was at fault at this point, but simply wanted the parties "to start from today going forward working together to try to get fair discovery completed." T 19 lines 24-25, T 20 line 1. The court warned, however, that the next time such problems arose, a hearing would be held and a recommendation would be made as to who was at fault. The language used was as forceful as the court could make it. T 19 lines 15-24.

The time has now come to adjudicate all of these issues, and the following observations are made. Fist, while the scheduling order quoted above stated that expert witness depositions are subject to the provisions of Rule 26(b)(4)(A)(ii), it is unmistakably implicit in that order that all parties shall ordinarily be allowed the opportunity to depose the

experts of their opponents. Indeed, the order states that discovery from experts causes delay in cases, and that to remedy that problem the parties were required to identify experts and exchange written expert opinions well in advance of the discover deadline so that depositions could be taken before discovery closes. Second, it is exactly this sort of issue which Local Rule 6(b) was intended to resolve by conferences between the parties. The only basis for the motion to quash was that Defendants had not filed a formal motion for permission to do so. By following Local Rule 6(B), the entire matter would have been resolved either between the parties or by the court after such a motion was filed. Third, Plaintiffs' counsel had several opportunities to tell her opposing counsel that she intended to file this motion. Instead, she engaged in communications which attempted to set dates for depositions, thus reasonably leading opposing counsel to believe that there was no other technical barrier to the depositions. By so doing, she caused the Defendants the expenses of such fruitless negotiations, and caused their attorneys to set aside July 17 and 18, 1990, on their calendars for the depositions, thus precluding the scheduling of other work on those days. Fourth, Defendants had filed a motion for a scheduling conference. The motion asked this court to facilitate the scheduling of the depositions of Plaintiffs' experts. Doc. 218, p. 2. By this motion the Defendants clearly said they wanted to depose Plaintiffs' two experts and wanted an order of depositions and cause the depositions to take place. It was, in effect, experts.

For all of these reasons, Plaintiffs' motion to quash the depositions filed June 27, 1990, was filed in bad faith as an intentional effort of Plaintiffs' counsel to obstruct discovery and cause needless expense to Defendants.

The motion to quash was denied as having been waived by Plaintiffs' behavior, T 22 lines 2-23. It was also denied because Defendants' motion for a scheduling conference was treated as a motion to depose Plaintiffs' two experts and was granted. T 22 lines 24-25, T 23 lines 1-3.

The next issue taken up at the hearing on June 29, 1990, was the scheduling of the depositions. The court had two concerns: whether the experts were actually ready to be deposed so that a deposition would be fruitful, and whether the experts and counsel were available for

July 17 and 18, 1990. The court made it clear that the discovery period would be extended to accommodate meaningful depositions, and that scheduling conflicts with the expert witnesses were to be avoided. T 27 lines 20-23.

As to the first issue, the court asked Ms. Reshard whether her experts had formulated their opinions and whether they were ready to do that now. Ms. Reshard said:

Yes. They have provided opinions back in 1986, in fact, July 1986, four years ago. (Emphasis added)

T 8 lines 15-19. The court was not satisfied with this answer, and asked: "Are your experts prepared now for deposition by Defendants . . . . Would a deposition be fruitful? Would it be a waste of time?" T 9 lines 20-25. When counsel responded twice that she did not understand, the court tried to asked the same question again. What followed was inconclusive. T 10 lines 1-25. So the court asked Ms. Reshard again: "Are your experts available for deposition on the 17th and 18th, as requested by the -- the Defendants?" Ms. Reshard finally replied: "Well, Your Honor, I have submitted the information to both experts, and Dr. Peniston's schedule, in all likelihood, will be able to do so. I have not heard from Dr. Taylor. He has not responded to my inquiry." (Emphasis added), T 11 lines 5-10.

Defendants were not satisfied with these answers, and asked the court to inquire again. T 29 lines 9-15, 20-23. The court first asked "[h]ave the experts been retained, and have they agreed to testify in this case?" T 29 lines 24-25. Plaintiffs' counsel replied: Yes, Your Honor. I indicated to them yesterday that I did -- that I -- that's why I got their statement, that's why I submitted their names; otherwise, there would be no reason to do so." (Emphasis added). T 30 lines 1-4.

The court next asked again if Dr. Peniston had "reviewed everything, and is he ready to answer questions." T 30 lines 8-10. The court intended to ask this same question with regard to Dr. Taylor, but that became unnecessary after Plaintiffs' counsel answered the question using the plural. She first repeated that there were some new documents she wanted Dr. Peniston to review. She then spoke of what she had done in late May 1990 regarding these depositions, stating that she had food poisoning, but "that following week [the first week of June 1990] I contacted them as I had promised. I have no reason to delay. In

fact, had they given dates when they said on May 2nd when we wanted to do it, I would have taken the dates to them then." (Emphasis added), T 30 lines 11-23. The court asked again, was Dr. Peniston ready for deposition, and again the Plaintiffs' counsels answer used the plural to indicate that both experts were ready to be deposed:

Well, obviously, Your Honor, it would be stupid for me, since it's in my interest, if testimony is going to be taken, that it's done in such a way that it supports my case to the extent that they can provide that information. And therefore, it would be in my interest to make sure, if there is anything else that they need, to provide it. I mean, that's the only reasonable thing to do. I have no reason to delay. And the delay that has gone forth thus far was unnecessary. (Emphasis added) T 31 lines 2-10. Having heard this response, this court told Ms. Reshard: "Okay. Well, I take that to mean that's clearer yes than I had asked for, and I appreciate that." T 31 lines 11-13.

Earlier the court had advised Ms. Reshard that the court concluded that Dr. Peniston's "opinions are ready and he says his schedule is ready," T 23 lines 15-17, 21-22, and the court turned to the availability of Dr. Taylor. Plaintiffs' counsel was allowed more than adequate opportunity to advise the court that either or both of her expert witnesses were not yet ready for deposition. Every response given by Plaintiffs' counsel indicated that both experts had been retained by Plaintiffs' counsel, had agreed to testify for Plaintiffs, had formed their opinions, and were ready to be deposed.

The second issue the court had to determine at the June 29, 1990, hearing was whether the two experts were in fact available on the dates proposed. Dr. Peniston's subpoena was for July 17, 1990, and counsel for Defendants asked whether he was available for deposition on July 18, 1990. The court asked Ms. Reshard if she had said that Dr. Peniston was available on the 18th, and she replied: "That's what I said, Your Honor." T 32, line 23.

Consequently, as to Dr. Peniston the court entered the following orders:

It is my order that subpoena includes the 18th, and counsel for the Plaintiffs shall make him [Dr. Peniston] available on the 18th for that deposition.

* * *

The deposition of Dr. Peniston is scheduled for the 18th, and that

subpoena is continued to that date, and the Plaintiffs' counsel is ordered to make him available on that date. He is expected to be prepared to give testimony as to whatever he is going to testify in this case, based upon every scrap of evidence that Plaintiffs have to date.
T 32 lines 24-25, T 33 lines, 1, 22-25, T 34 lines 1-2.

There remained a question of whether the subpoena had been served upon Dr. Taylor, and it was unknown whether he was available either the 17th or 18th of July. Counsel for Defendants were to express mail a notice to Dr. Taylor to advise him that his deposition was scheduled, and give him notice to call the magistrate's office as to whether he was available on the 17th and 18th. The court then entered the following order as to Dr. Taylor's deposition:
If he [Dr. Taylor] is available, Plaintiffs' counsel is ordered to be -- to ensure that he is ready to go for deposition and to give his opinions as to every scrap of evidence that the Plaintiffs now have in their possession.
T 34 lines 22-25. The only contingency in the order to Plaintiffs' counsel was the question of Dr. Taylor's own schedule.

After other matters were taken up at the June 29, 1990, hearing, the court made the following entreaty to the parties: okay. I would like to end on a hopeful note. I would like everyone all seated here, you are lawyers, and lawyers have an obligation to work together because it's an honorable work that we are doing trying to bring controversies to court and to a jury for ultimate resolution. And I ask everyone to do that. I ask you, Ms. Reshard, because you are a lawyer, to make things work smoothly and to give and take with the other side. And I say that to Defense counsel as well. And I hope you can set aside the differences you've had before and begin today doing that. I hope that you will.
T 50 lines 17-25, T 51 lines 1-3.

The court's entreaties, as well as the court's orders, were ignored by Plaintiffs' counsel. Only July 5, 1990, Ms. Reshard inspected the original of the notice of depositions of expert witnesses, doc. 225. She observed that Ms. Andrews had signed only the certificate of service. Affidavit of Connie Reshard dated July 5, 1990, attached to doc 254.

Fourteen days later (on July 18, 1990) Ms. Reshard filed a motion to strike Defendants' notice of taking depositions. Doc. 254. The

motion declared that Defendants' notice of depositions and this court's subpoenas were "NULL AND VOID" BY OPERATION OF LAW," "PLAINTIFFS counsel is not required to comply with the taking of depositions . . . ." Doc. 254, p. 3.

The only basis for this second motion to block the depositions was that Ms. Andrews signature appeared in only one place on the notice of depositions. This was a notice of depositions that was served and filed on June 21, 1990, eight days before this court held a hearing and painstakingly afforded Plaintiffs every opportunity to raise legitimate objection they might have to the depositions.

The second motion to strike the notice of deposition had no conventional certificate of service, but recited that was mailed on July 16, 1990. Doc. 254. At the hearing on the motion for sanctions,[13] Ms. Reshard said that her second motion was mailed close to midnight on July 16, 1990. The depositions were to have commenced the next morning.

At the hearing upon the motion for sanctions, Mr. Seymoe, counsel for Defendant Chokhawala, said that he talked with Ms. Reshard by telephone on July 16, 1990. He asserts that he asked Ms. Reshard whether the depositions were still going to take place the next day. Ms. Reshard denied this. Ms. Reshard's denial is not credible. It is more credible, given the history of this case, that Mr. Seymoe did directly ask Ms. Reshard whether or not the depositions were still on for the following morning. Ms. Reshard admitted that she did not tell Mr. Seymoe that she was filing a motion to strike the notices of depositions, admitted that she did not tell Mr. Seymoe that the depositions were canceled, and admitted that she did not confer with any of the defendants before filing her second motion to strike the notices of depositions.

The second motion to block the depositions was not accompanied by any certificate of counsel for Plaintiffs that she contacted counsel for the Defendants prior to filing the motion, or that they had any notice that she would not attend the depositions before they left Tallahassee, Florida, for Washington, D.C.

Counsel for Defendants thus were not notified that Plaintiffs' counsel would not attend the depositions, and flew to Washington, D.C.

---

13 The hearing on the motions for sanctions was held on December 6, 1990.

A short deposition was taken from Dr. Taylor, about which more will be said, and a telephone transcription of a conversation with Dr. Peniston was also obtained. Plaintiffs' counsel failed to show up for the depositions.

In the period following the June 29, 1990, hearing and the date scheduled for the depositions, Plaintiffs had appeals pending before Chief Judge Stafford. On July 2, 1990, Plaintiffs filed an appeal, doc. 233 and 235, from orders entered by the magistrate, docs. 220, 224, and 232. There was no stay of these orders during this period, and Stafford denied Plaintiffs' appeal before she filed the second motion to strike the notices of depositions.

In summary, once again Plaintiffs' counsel had unilaterally blocked discovery, and again the basis for doing so was completely spurious. The court had ordered that these depositions occur by the first order entered June 20, 1990. The court denied Plaintiffs' first motion challenging the notices of depositions after an extensive hearing on June 29, 1990, at which time Plaintiffs' counsel was given a full opportunity to present any legitimate objection that might exist to the conduct of these depositions on July 17 and 18, 1990. And Plaintiffs' counsel was personally ordered to see that the depositions were to take place.

Plaintiffs' counsel discovered the claimed defect in the notice of deposition on July 5, 1990, yet she told no one. She waited until midnight of the day before the depositions were to take place before mailing the second motion to strike, unilaterally declaring herself absolved of this court's order to cause these depositions to take place. She did not even tell Defendants' counsel so that they could avoid the expense of traveling to Washington, D.C. By refusing to attend the depositions, Plaintiffs' counsel, and Plaintiffs, contemptuously[14] violated this court's order that she make her experts available for deposition on July 17 and 18, 1990.

The second motion to strike the notice of depositions was like the first, unreasonable and baseless. This was only a notice of taking depositions, hardly a major pleading in the file. It had been preceded by

---

[14] This report and recommendation does not attempt to address contempt in the formal sense, or recommend a penalty for contempt of court, though a basis for such proceedings is probably extant in this record.

a long history of attempts by defense counsel to communicate with Ms. Reshard to set these two depositions. It had been preceded by a motion filed on behalf of all Defendants by Ms. Andrews asking that these depositions be scheduled. It had been preceded by this court's order that the depositions be held on July 17 and 18, 1990. Ms. Andrews signed the certificate of service, and that certificate explicitly identified service of a notice of deposition of Drs. Peniston and Taylor. It is impossible for Plaintiffs to have believed that Ms. Andrews did not file this notice of depositions with the intent formally to schedule them for July

In summary, once again Plaintiffs' counsel had unilaterally blocked discovery, and again the basis for doing so was completely spurious. The court had ordered that these depositions occur by the first order entered June 20, 1990. The court denied Plaintiffs' first motion challenging the notices of depositions after an extensive hearing on June 29, 1990, at which time Plaintiffs' counsel was given a full opportunity to present any legitimate objection that might exist to the conduct of these depositions on July 17 and 18, 1990. And Plaintiffs' counsel was personally ordered to see that the depositions were to take place.

Plaintiffs' counsel discovered the claimed defect in the notice of deposition on July 5, 1990, yet she told no one. She waited until midnight of the day before the depositions were to take place before mailing the second motion to strike, unilaterally declaring herself absolved of this court's order to cause these depositions to take place. She did not even tell Defendants' counsel so that they could avoid the expense of traveling to Washington, D.C. By refusing to attend the depositions, Plaintiffs' counsel, and Plaintiffs, contemptuously[15] violated this court's order that she make her experts available for deposition on July 17 and 18, 1990.

The second motion to strike the notice of depositions was like the first, unreasonable and baseless. This was only a notice of taking depositions, hardly a major pleading in the file. It had been preceded by a long history of attempts by defense counsel to communicate with Ms.

---

15 This report and recommendation does not attempt to address contempt in the formal sense, or recommend a penalty for contempt of court, though a basis for such proceedings is probably extant in this record.

Reshard to set these two depositions. It had been preceded by a motion filed on behalf of all Defendants by Ms. Andrews asking that these depositions be scheduled. It had been preceded by this court's order that the depositions be held on July 17 and 18, 1990. Ms. Andrews signed the certificate of service, and that certificate explicitly identified service of a notice of deposition of Drs. Peniston and Taylor. It is impossible for Plaintiffs to have believed that Ms. Andrews did not file this notice of depositions with the intent formally to schedule them for July 17 and 18, 1990. Plaintiffs' assertion that the pleading was defective by lacking of a signature preceding the certificate of service was a sham.

Moreover, Plaintiffs' citation of Fed. R. Civ. P. 11 as a basis for the motion was an abusive resort to this overworked rule. Rule 11 provides in apart:

If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omissions is called to the attention of the pleader or movant.

(Emphasis added.) Local Rule 6(B) required Plaintiffs' counsel to confer with Ms. Andrews before filing this motion and give her an opportunity, as stated in Rule 11, to sign the notice as demanded by Plaintiffs. Plaintiffs' counsel could not have seriously believed Ms. Andrews would not have done so in view of her prior attempts to schedule these depositions, her motion for a scheduling conference, and this court's two orders that the depositions be held on these dates.[16]

On July 17, 1990, Dr. Taylor appeared for his deposition and a transcript has been filed of that deposition. Doc. 291. Ms. Reshard did not appear to represent the Plaintiffs. Id., pp. 2-3, 6. Dr. Taylor was placed under oath.

In her response to Defendants' motion for sanctions, Plaintiffs' counsel claimed that it "smells illegality and unethical conduct by defense counsel" that Dr. Taylor appeared as his scheduled deposition

---

[16] It is hard to see how the purpose of rule 11 was even involved with a notice of depositions under these circumstances except to show that the person signing it had read it, and that function was completely served by the signature on the certificate of service. A notice of deposition does not allege any facts or argue any points of law, and thus there is no serious occasion for the application of the provision of rule 11 that an attorney's signature on the document constitutes a belief that it is "well grounded in fact and is warranted by existing law."

and testified that he had no expert opinion and was told by Ms. Reshard not to attend the deposition. It would appear that the wind is from the other direction. Dr. Taylor's testimony was under oath. Plaintiffs' charge is accompanied by no supporting evidence. As an argument that this deposition cannot be considered by the court because Plaintiffs' counsel was not present at the deposition it is not very persuasive given the fact that the court had ordered her to be there.

The following are the significant excerpts from Dr. Taylor's testimony:

Q Dr. Taylor, do you anticipate testifying in the trial in the case that I described earlier"

A Well, I'm not aware of the details of the case, the charges that have been levied. So I'm really not aware of the nature of the case, except by your comments at the beginning of this deposition.

Q The comments that I made on the record?

A Yes.

Q Have you formed an opinion such that you are prepared to express an opinion today that any one of the defendants in this case is guilty of medical malpractice?

A I do not have an opinion.

Q Could you tell me of the contacts that you have had with counsel for the plaintiff, Ms. Connie Reshard, with regard to this matter?

A Several years ago, and I can't remember the exact year, probably '86 or '87 perhaps, or earlier, it has been that long, I was contacted by Ms. Reshard to review certain records relative to the death of her mother. I discussed those items with her and reviewed the records in her presence briefly, and I might add superficially, and suggested that she seek other experts in the area that I felt were appropriate, specifically cardiology and cardiothoracic surgery. But other than that contact, there has been no other contact, and specifically there has been no contact since those dated in '86 or '87 until the last week or so.

Q Prior to the last week or so did you provide her with any written reports?

A I can't recall that I did. It's possible that I might have back in those dates in '86 or 87'. I looked through my files yesterday and I could not find them, but I've moved from another office recently and they might

have been misplaced. There is a possibility that I might have provided her with some information relative to the overall medical condition, but I don't recall that I did.

* * *

Q Has she since that time been back in touch with you to ask you for a copy of your cv or curriculum vitae.?

A Not that I' m aware of. My contact with her was just briefly during that period in the mid-80s. I don't recall giving her a CV. I might have, but I don't recall, and she has not contacted me for a CV or for any additional information since that date.

Q She hasn't asked you to give her any opinions that she might use to answer interrogatories reciting what she expects your testimony to be?

A No, sir.

* * *

Q Did she discuss with you whether or not you should attend this deposition this morning?

A She suggested that the deposition should be ordered by the judge, and that if the judge ordered it, then I should be available, but under no other circumstances should I be obligated to attend.

Q Did you tell her at that time that you were not prepared to express an opinion in the case?

A I did.

Q How many days ago was that?

A Probably seven or so, five or seven or 10 days.

****

Q In the conversation that you had with Ms. Reshard where she indicated that if the judge ordered it you should be available for the deposition, did that occur in the conversation five to maybe 10 days ago?

A Yes.

Q. And is that the last time you talked to her?

A Yes.

Q. Mr. Davis asked you a few questions concerning opinions, and I just want to go back for a minute.

Doctor, would it be fair to say that you have not formulated an opinion within a reasonable degree of medical probability with respect to

any of the defendants' care falling below the standard of care?

S. Not at this time.

Q You have not formulated any such opinions?

A I have not.

Q And you have no intent to do so?

A No, I do not.

* * *

Q Yes, sir. Doctor, if Ms. Reshard has represented to the court and to all parties, including counsel, that she has had your input in the course of answering interrogatories, meaning written questions, and that those questions represent your opinions, Doctor, would that be a true and accurate representation on her behalf?

A I don't believe I have given any written opinions.

Q And you have not given any opinions to her verbally which you have authorized her to represent as your opinions?

A Not that I'm aware of.

Q And you would be aware of that, Doctor, if you had done that, wouldn't you?

A I believe I would.

* * *

Q Dr. Britt is a cardiologist, Is it correct that you are not a cardiologist?

A That is correct.

Q And that you would not feel competent from a similar health care provider's standpoint in expressing opinions as to whether Dr. Britt

did or did not comply with generally recognized standards of care, would that be so?

A In regard to general medical care I perhaps could provide an opinion, but I am not a cardiologist and therefore any items related to cardiology or the practice of cardiology I would not feel that I would be an expert in that regard.

Q You had no residency in cardiology?

A I am not.

Q If I understand correctly, your primary emphasis is in the area of pharmacology?

A That's correct.

Q So as we sit here today you have no opinions one way or another as to whether Dr. Britt did or did not comply with standards of care as it relates to the care and treatment of Minnie Reshard?

A Particularly, no, I do not.

* * ** *

Q Do you know Dr. Chokhawala?

A I do not.

Q You are of course not a psychiatrist; is that correct?

A I am not.

Q You are not board certified in that field?

A. No. Sir.

Q And would have no opinion as to the care rendered by Dr. Chokhawala in this matter?

A Absolutely not.

* *

Q Did you have any conversations with her as to whether or not you would be willing to serve as an expert on her behalf?

A I don't recall. I really don't recall. But certainly because I'm not a cardiologist the answer is I probably did not.

* * *

Q You don't have any experience in hospital administration or nursing staff administration. Do you?

A NO.

Q Emergency room administration?

A. I do practice emergency medicine, but not administration.

Q I take it you wouldn't consider yourself an expert in the area of

hospital emergency room or nursing administration as well?

A I would not.

Q You indicated that you recommended that she speak with particularly cardiologist and perhaps some others. Could you tell us who those individuals were to whom you referred her?

A I suggest that she discuss the case with Dr. Reginald Peniston, who is a cardiothoracic surgeon.

Q Do you recall anyone else's name?

A I don't recall.

Q Have you discussed this matter with Dr. Peniston?

A. I have not.

Mr. Davis: Thank you. That's all I have.

Ms. Andrews: One last question.

By Ms. Andrews:

Q Dr. Taylor, would it be fair, sir, to say that you have no intent of testifying as to any of the defendants who have been listed in this litigation as having fallen below the standard of care?

A. I have no intention of testifying, no.

* * *

Q Dr. Bonk is a radiologist. Is that specialty outside your field?

A It is.

Q Did you have an opportunity to review any of the x-ray films of Ms. Reshard's mother?

A I don't recall.

Q And I guess the same question everyone else has asked you, do I assume correctly that you will not be rendering any type of expert medical opinion about the actions of Dr. Bonk, the radiologist?

A I will not.

Id., p.8 lines 2-22, p. 9 lines 1-15, p. 10 line 22, p. 11 lines 1-10, p. 12 lines 14-22, p. 13 lines 1-2, p. 14 lines 9-22, p. 15 lines 1-4, 14-22, p. 16 lines 1-6. 15-22, p. 17 lines 1-16, p. 18 lines 3-10, 20-22, p. 19 lines 1-3, 8-22, p. 20 lines 1-16, 21-22, p. 21 lines 1-9.

In summary, Dr. Taylor denied having any expertise to testify as to cardiology against Defendant Britt, as to psychiatry against Defendant Chokhawala, as to hospital, nursing, or emergency health care administration against Defendant TCH, or as to radiology against Defendant Bonk. Dr. Taylor said he had no intention of testifying against

Defendants in any capacity and had formulated no opinion as to the merits of this case. He could not recall giving information to Ms. Reshard to answer Defendant's interrogatories. He had no copy of any written medical opinion provided to Ms. Reshard in the past. Ms. Reshard had not recently contacted Dr. Taylor for his curriculum vitae as she had been ordered to do by this court. As to attendance at the deposition which this court ordered to take place on July 17, 1990, Dr. Taylor testified that in early July 1990 he told Ms. Reshard that he was not prepared to express an opinion in this case. He also testified that Ms. Reshard told him that under no circumstances should he attend the deposition unless it was ordered "by the judge."

From this the following findings are made:

1. Ms. Reshard's sworn answer to interrogatory 8 of Dr. Britt that Dr. Taylor had formed an expert opinion as to reading x-rays (radiology), care for a patient with dissecting aorta (cardiology), and standards of care for a hospital, and that he was either retained as or intended to be an expert witness for Plaintiffs in this case was false.

2. Ms. Reshard's deposition testimony that she had Dr. Taylor's agreement to be an expert witness was false. Ms. Reshard' deposition testimony that she answered the Defendants' interrogatory as to the substance of Dr. Taylor's opinion from information received from Dr. Taylor was false.

3. Ms. Reshard's representations to this court on June 29, 1990, that Dr. Taylor had agreed to be Plaintiffs expert witness, that he had formulated an expert opinion, that there was no reason for delay and that he either was ready for his deposition to be taken or could be made ready by July 17th, were false, and Ms. Reshard knew they were false when these untruths were said to this court.

4. Ms. Reshard willfully disobeyed this court's order to make Dr. Taylor available for deposition.

5. Ms. Reshard willfully attempted to obstruct this court's order by instructing Dr. Taylor not to attend the deposition absent an order from "the judge."

Dr. Peniston did not appear at all for his depositions.[17] It is

---

[17] Since counsel for Defendants were together with a court reporter to take Dr. Peniston's deposition on July 18, 1990, when he failed to show up, they called him. The telephone call was transcribed by the court reporter with prior notice to Dr. Peniston. The

concluded that Plaintiffs' counsel willfully violated this court's order to make Dr.. Peniston available for deposition on July 18, 1990.

IV. Conclusion of Law

Pursuant to Fed. R. Civ. P. 37(b)(2(c), the sanction of dismissal of the action is authorized where a party fails to obey an order to provide or permit discovery. Rule 37(b) provides that an award of expenses, including attorney's fees, caused by the failure to obey a discovery order may be made in addition to or in lieu of other sanctions. Dismissal of an action pursuant to this Rule was affirmed in by the Eleventh Circuit in *Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d 480 (11th Cir. 1982), *cert. denied* 460 U.S. 1040 (1983) where the court had twice ordered the Plaintiff to serve adequate answers to interrogatories and he failed a third time to serve adequate answers. No other improprieties existed. The court noted that the standard for sustaining the sanction of dismissal was whether the party's discovery failure was due to willfulness, bad faith or disregard of responsibilities, or a flagrant disregard for the court and the discovery process. 691 F.2d at 481. *See also Properties International Ltd. v. Turner*, 706 F.2d 308, 310 (11th Cir. 1983). The court in the *Aztec Steel* case also ruled that the district court must first consider whether a less drastic sanction would be equally effective. 691 F.2d at 481-82.

---

court entered an order requiring that this transcript be sent to Dr. Peniston, and giving him until December 16, 1990, to tell the court whether the transcript is inaccurate. Docs. 372 and 370. Dr. Peniston promptly replied, and did not advise that the transcript was incorrect in any way. Doc. 374. Dr. Peniston is correct that this was not a deposition, and Defendants' counsel made that clear to him in the telephone conversation. Doc. 374, T 9. Since this transcript is not taken under oath, it has not been relied upon in this report and recommendation. It is noted, however, that if Dr. Peniston's statements in this transcript had been under oath, that is, if he had obeyed the subpoena to appear for his deposition as did Dr. Taylor, the court could have before it Dr. Peniston's statement that Ms. Reshard told him not to attend his scheduled deposition. Doc. 374. T 10. This would be another incident of willful obstruction of this court's order to Plaintiff's attorney.

In *Gates v. United States*, 752 F.2d 516 (10th Cir. 1985), dismissal was found to be justified pursuant to Rule 37 upon the failure of Plaintiffs to attend depositions ordered by the court.

The Third Circuit has established guidelines for the balancing interests when a motion for the sanction of dismissal pursuant to Rule 37 is considered. Those interests are:

(1) The extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Hicks v. Feeney, 850 F.2d 152, 156 (3rd Cir. 1988), *cert. denied* 109 S.Ct. 786 (1989), quoting *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3rd Cir. 1984) (emphasis by the court).

Dismissal of a case is also authorized by Fed. R. Civ. P. 41(b) for failure of the plaintiff to comply with the Federal Rules of Civil Procedure or any order of the court. The legal standard for application of this sanction is "whether there is a 'clear record of delay or willful contempt and a finding that lesser sanctions would not suffice.'" *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985), *quoting Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983).[18] Dismissal with prejudice is a "a sanction of last resort, applicable only in extreme circumstances." Id. The Eleventh Circuit in the *Goforth* case also noted that while "dismissal imposes a severe penalty on a client for the misconduct of an attorney," "where any other sanction would fail to cure the harm that the attorney's misconduct would cause to the defendant, dismissal can be appropriate." *Id.*

Finally, the sanction of dismissal is authorized by Fed. R. Civ. P. 16(f) where either a party or a party's attorney "fails to obey a scheduling or pretrial order." Of this Rule, the Eleventh Circuit has said that "[t]he sanctions contained in Rule 16(f) were designed to punish lawyers and parties for conduct which unreasonably delays or otherwise

---

[18] Jones v. Graham indicated that dismissal would be justified if there had been a clear record of delay or willful contempt and a finding that lesser sanctions will not suffice. 709 F.2d at 1458.

interferes with the expeditious management of trial preparation." *Goforth v. Owens, 766 F.2d* at 1535.

Rule 37(b) should be first considered since many of the problems this case has experienced have been with discovery. The Third Circuit's guidelines in the *Hicks* case are useful in this context.

In this case, since Plaintiff's counsel is one of the Plaintiffs, her personal involvement in the events described in this report and recommendation has been complete. This is not a case of unfairly visiting the sins of a lawyer on an innocent client.

Prejudice to the Defendants has been great. Defendants began in 1986 trying to discovery the opinions of those experts Plaintiffs intended to call at trial. They have been hampered at every turn by Plaintiffs' counsels' telephone inaccessibility, numerous spurious motions to block discovery, unilateral cancellation of scheduled depositions, frivolous but lengthy appeals of every order entered by the magistrate, and finally willful disobedience to this court's order that the depositions take place. After all this expense and effort, Defendants know no more now about what Dr. Peniston's opinion is than they did in 1986.

There has been an extensive history of dilatory behavior by Plaintiffs. It was first noted by an order of this court in 1986. It has continued unabated by the willful timing of baseless motions.

That willful misconduct and bad faith have been the motivating elements has been found in the discussions of fact above. Ms. Reshard has been untruthful under oath twice, in answering interrogatories and in her deposition. More seriously, o the court's questions on June 29, 1990. There has been willful disobedience of this court's order that Plaintiffs experts be deposed. Dr. Taylor testified under oath that Plaintiffs' counsel told him he need not attend, that he could disregard this court's subpoena. This was behavior beyond willful disobedience to an order requiring discovery. It was obstruction of this court's order that discovery occur.

As to the merits of this case, Plaintiffs may have some meritorious claim based upon the opinion of Dr. Peniston, but they have successfully hidden it form the Defendants and the court. Their success in that regard now leaves the record bare since it has been shown that Dr. Taylor provides no support.

Hicks and cases from the Eleventh Circuit especially counsel that this court evaluate whether lesser sanctions will reasonably vindicate the interest which Rule 37 is intended to protect. An award of expenses including attorney's fees would partially make Defendants whole but would not be adequate on this record. Fair and just trials in this court depend upon a fair discovery process. Willful misconduct taken in bad faith to block fair discovery strikes at the very heart of a fair trial. The central reason for the existence of this court is to provide fair trials to litigants. Financial reimbursement to Defendants is far too little in this circumstance. Punishment and deterrence are essential where a litigant has impeded the right of others to a fair trial and has sought to thwart the fundamental purpose of this court.

An order of contempt as a sanction also contemplated by Rule 37(b), but contempt is not a proper alternative to dismissal.[19] While the penalties for contempt can be severe, they are personal and not logically connected to the cause at hand. Here Plaintiffs have willfully refused to allow Defendants a fair opportunity to prepare their defenses on the merits. The sanction which this court imposes should be connected with that behavior and the merits of this case, and serve as a deterrent t others who would serve up such roadblocks to a fair trial on the merits.

An order striking pleadings, defenses, or claims, in this context, is much the same as an order of dismissal. While the court might order that Plaintiffs not be allowed to use experts at trial, this would effectively be a dismissal since this is a medical malpractice case. Defendants should not be put to the expense of this sort by making necessary motions for summary judgment or trial and directed verdict. Moreover, denial of use of Dr. Taylor at trial would be no sanction at all.

Dismissal of this action with prejudice, therefore, is essential to vindicate the interest protected by Rule 37(b)(2).

Furthermore, since there has been a clear record of delay in this case and willful contempt, and since lesser sanctions will not suffice, dismissal of the action is both authorized and required by Fed. R. Civ. P. 41(b). Dismissal is the proper sanction pursuant to Fed. R. Civ. P. 16(f) as well because both the Plaintiffs and Plaintiffs attorney have intentionally disobeyed a pretrial order of this court.

---

[19] That is not to say that contempt proceedings ought not be instituted at all. It is only to say that as a Rule 37 sanction, it is no substitute for dismissal.

Sanctions should include an award of expenses and attorney's fees as well. Every expense caused Defendants from June 18, 1990, when Plaintiffs' counsel determined to miss the scheduling conference without calling defense counsel, to the present should be reimbursed these Defendants. Expenses and attorney's fees should be awarded for all efforts to take the depositions of Drs. Peniston and Taylor, which includes attendance at the June 20, 1990, scheduling conference, responding to all motions filed by Plaintiffs that relate to rate's orders from June 20, 1990 to date, which the court has found to be baseless, and the filing and litigation of the motions for sanctions and the responses to motions denied in this order. Expenses and attorneys' fees for preparation of motions for summary judgment or for other work in case preparation should not be a part of this sanction, however. Accordingly it is ORDERED that:

1. Plaintiffs motion to vacate findings of fact, doc. 344, is DENIED.

2. Plaintiffs' motion to strike the deposition of Plaintiff Connie Reshard, doc. 332, is DENIED.

3. Plaintiffs' motion to strike Defendants' notice of taking of depositions duces tecum, which were scheduled for July 17 and 18, 1990, in Washington, D.C., doc. 254, is DENIED.

it IS FURTHER RECOMMENDED:

1. That Defendants' motions for sanctions, docs. 273, 279, 280, 290, and 297, be GRANTED.

2. That as a sanction pursuant to Fed. R. Civ. P. 37(b)(2(C), 41(b), and 16(f) the court DISMISS the complaint in this case with prejudice, retaining jurisdiction to award as an additional sanction expenses and attorneys' fees.

3. That as a sanction pursuant to Fed. R. Civ. P. 37(b)(2)(C), 41(b), and 16(f) the ORDER that the Plaintiffs' and Plaintiffs' counsel shall pay to Defendants their expenses, including attorneys' fees, for all work and expenses related to their attempts to take the depositions of Drs. Peniston and Taylor from June 18, 1990, to date, including without limitation attendance at the June 20, 1990, scheduling conference, responses to all motions filed by Plaintiffs that relate to this issue, responses to all appeals of the magistrate's orders from June 20, 1990, to date, attempts to communicate with Plaintiffs as to this

question, and the filing and litigation of the motions for sanctions and the responses to motions denied in this order.

4. That the court REMAND this case to the magistrate for entry of an order as to the amount of these proposed findings, recommendations or report within ten (10) days after being served with a copy thereof. The time for filing such objections is hereby extended to forty (40) days from the date of entry of this order on the docket. Objections shall be in writing, specifically identify the portions to which objection is made, and state the basis for such objections. Objections shall be filed with the Clerk of the Court, and copies shall be served on the magistrate and all other parties. A party may respond to another party's objections within thirty (30) days after being served with a copy thereof. Defendants are encouraged, but not required, to file one consolidated response. Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of factual findings. *U.S. v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. den[ied]*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

In CHAMBERS at Tallahassee, Florida, this 14th day of December, 1990.

/s/

WILLIAM SHERRILL, JR.
UNITED STATES MAGISTRATE

App. 84

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD AND LEROY RESHARD, **Filed April 12, 1990**
Plaintiffs,

VS. TCA 85-7216-WS

DR. EARL BRITT, et al.,
Defendants.

_____/

ORDER

[OMITTED TEXT]
ORDERED that:

1. Plaintiffs' emergency motion for a protective order as to depositions, doc. 107, is DENIED. The parties shall reschedule these depositions to occur within thirty (30) days from the date of entry of this order on the docket.

[REMAINING TEXT OMITTED Annotation: Plaintiffs were effectively foreclosed from scheduling any depositions; at the end of the 30 days, Defendants later asked the court to allow them to take the depositions within the normal prescribed time, in effect reducing the total discovery period for Plaintiffs.] R 4 -194.

UNITED STATES STATUTES

28 U.S.C. A. § 144 (West Supp. 1997): Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shown for failure to file it within such time . . . .

28 U.S.C.A. § 455: (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

28 U.S.C.A. § 636: Notwithstanding any provision of law to the contrary

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magisrate shall file his proposed findings and

recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C.A. § 753(b) ¶ 2: Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to the discretion and approval of the judge . . .

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them for the public records of the court for not less than ten years.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

28 U.S.C.A. § 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

28 U.S.C.A. § 1291: The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

28 U.S.C.A. § 1332: Diversity of Citizenship; amount in controversy; costs. (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --

(1) citizens of different States . . . .

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 4: "(a)(1) In a civil case in which an appeal is permitted by law

as of right from a district court to a court of appeals the notice of appeal shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. . . (7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

RULE 10: (A) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases . . .(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Rule 27 (c): Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise

determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed . . .

FEDERAL RULES OF CIVIL PROCEDURE (Pre-1993).

RULE 11: Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion , or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

RULE 16:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the se

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(f) SANCTIONS. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of

any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. Fed. R. Civ. P. 16 28 U.S.C. A.
(West 1992).

RULE 26

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3)TRIAL PREPARATION: MATERIAL. Under provision (b)(4) of this

rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety. indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4)TRIAL PREPARATION: EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person call as an expert witness at trial, to state the subject matter on which the expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from who discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part,

the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.
(d) SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.
(e) SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior responses.
(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney or record in the attorney's individual name, whose address shall be stated. A party who is not represent by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the sand that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

RULE 30

(b) Notice of Examination: General Requirements; Special Notice; non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substances which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the

signing or the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of the submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

RULE 32

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(e) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted,

filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 33. Interrogatories to Parties:

(a) Availability; Procedures for Use. Any party may serve upon any other party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records,

including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

RULE 34: **Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents . . .

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested . . . .

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion

the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to Comply With Order.**

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails to obey made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A),(B), and (C) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

RULE 41

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

RULE 52: Findings by the Court; Judgment on Partial Findings. (a) Effect. In all actions tried upon the facts without the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . .

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 59:

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend

the judgment shall be served not later than 10 days after entry of the judgment.

RULE 60: (B) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On a Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could note to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court . . . .

RULE 72: Magistrates; Pretrial Matters

(a) Nondispositive Matters. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and

shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(d) Dispositive Motions and Prisoner Petitions. A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district court shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

SELECTED FEDERAL RULES OF CIVIL PROCEDURE, POST DECEMBER 31, 1993

Rule 11. Signing of Pleadings, Motions, and Other Papers;Representations to Court; Sanctions.

(a) **Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party . . . An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of

the attorney or party . . . .

Rule 26. General Provisions Governing Discover; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if know, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the the party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) **Pretrial Disclosures.** In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately

identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed served, and promptly filed with the court.

(5) Method to Discover Additional Matter. Parties may obtain discover by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and

interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (I) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from . . .

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholding information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or thins not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition is to be taken may make any order which justice requires to protect a party or person from

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosure and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information

thereafter acquired if ordered by the court or in the following circumstances.

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additional or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admissions the party learns that the response in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties: Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosure required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed n phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. I a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount or the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken; When Leave Required.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in for or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or

by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

Rule 32(b): Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objections may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which whould require the exclusion of the evidence if the witness were then present and testifying.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) **Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) **Motion.**

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond to that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) **Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) **Expenses and Sanctions.**

(A) If the motion is granted or if the disclosure or requested discovery is provided after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was

substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that part from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraph (A),(B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party

requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or(3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C)of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) Repealed

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Florida Statutes

Section 395.002 Definitions

(1) **"Accrediting organizations"** means the Joint Commission on Accreditation of Health care Organizations, the American Osteopathic Association, the Commission on Accreditation of Rehabilitation Facilities, and the Accreditation Association for Ambulatory Health Care, Inc.

(8) "Emergency medical condition" means:

(a) A medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:

1. Serious jeopardy to patient health, including a pregnant woman or fetus.
2. Serious impairment to bodily functions.
3. Serious dysfunction of any bodily organ or part.

(9) "Emergency services and care" means medical screening, examination, and evaluation, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under the supervision of a physician, to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility.

395.009: Minimum standards for clinical laboratory test results and diagnostic x-ray results

(2) Each licensed facility, as a requirement for issuance or renewal of its license, shall establish minimum standards for acceptance of results of diagnostic X-rays performance by or for the licensed facility.

395.1041 (c) A patient, whether stabilized or not, may be transferred to another hospital which has the requisite service capability or is not at

service capacity, if:

(d)1. Every hospital shall ensure the provision of services within the service capability of the hospital, at all times, either directly or indirectly through an arrangement with another hospital, through an arrangement with one or more physicians, or as otherwise made through prior arrangements.

Section 395.1046 Complaint investigation procedures.

395.302 Patient records; penalties for alteration

(1) Any person who fraudulently alters, defaces, or falsifies any medical record, or causes or procures any of these offenses to be committed, commits a misdemeanor of the second degree, punishable as provided in § 7765,082 or § 775.083.

Section 395.3015. Patient records; form and content

Each hospital operated by the agency . . . shall require the use of a system of problem-oriented medical records for its patients, which system shall include the following elements: basic client data collection; a listing of the patient's problems; the initial plan with diagnostic and therapeutic orders as appropriate for each problem identified; and progress notes, including a discharge summary. The agency shall, by rule, establish criteria for such problem-oriented medical record systems in order to ensure comparability among facilities and to facilitate the compilation of statewide statistics.

395.3025 Patient and personnel records; copies; examination: (1) Any licensed facility shall, upon written request, and only after discharge of the patient, furnish, in a timely manner, without delays for legal review, to any person admitted therein for care and treatment or treated thereat, or to any such person's guardian, curator, or personal representative, or in the absence of one of those persons, to the next of kin of a decedent or the parent of a minor, or to anyone designated by such person in writing, a true and correct copy of all patient records, including x-rays, and insurance information concerning such person, which records are in the possession of the licensed facility, provided the person requesting such records agrees to pay a charge. ... The licensed facility shall further allow any such person to examine the original records in its possession, or microfilms or other suitable reproductions of the records, upon such reasonable terms as shall be imposed to assure that the records will not be damaged, destroyed, or altered.

768.16 Wrongful Death Statute

768.17 Legislative intent

It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16 -768.27 are remedial and shall be liberally construed.

768.19 Right of action

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or water craft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

768.20 Parties

The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. . . .

768.21 Damages

All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. . . .

Dr. Britt's Orders for a Thyroid Panel and Scan [The **THYROID SCAN IS WHAT IS MISSING]**

PHYSICIANS ORDERS, Plaintiff's Exhibit A-4, D.C. No. 85-7216 (R4-183-Exht. A-4)

(1) T_3, T_4, T7

(2) ESR

(3) Thyroid Scan

signed Dr. Earl Britt on August 4, 1983.

RESULTS OF INTERNATIONAL CLINICAL LABORATORIES, Plaintiffs Exhibit A-2 (R4-183-Exht. A-2)

Time Collected: 4:33 P.M. on August 4, 1983

Thyroid Profile:

T_3 RESIN UPTAKE:	30.1	23%-32%
T_4:	9.6	4.5-13.0 MCG/DL
T_7:	2.9	1.0-4.3

Proof of Facts, 3d Series, Taber's Cyclopedic Medical Dictionary 16th ed., Lawyers Cooperative Publishing, Rochester, New York, ed. by Clayton L. Thomas, M.D. M. P. H.

Thyroid Function Tests: Tests for evidence of increased or decreased thyroid function including clinical physical examination, which is usually reliable, and a variety of reliable laboratory tests. Some of the more common tests are based on direct or indirect determination of the two thyroid hormones, and triiodothyronine (T_3) and tetraiodothy-ronine (T_4). Also frequently used are tests on radioactive iodine uptake by the thyroid. Id at 1864.

T_3 Triiodothyronine (a thyroid hormone)

T_4 Thyroxine (a thyroid hormone)

T_7 free thyroxin index

ESR: ELECTRON SPIN RESONANCE: A relatively new technique used in medical imaging that identifies atoms by their electron spin characteristics; erythrocyte sedimentation rate. Id. at 624. Erythrocyte: A mature red blood cell or corpuscle. Each is a non-nucleated, biconcave disk averaging 7.7. microns. Id. 620.

THYROID SCAN:

RADIOPHARMACEUTICALS: BALLINGER, P.W., MERRILL'S ATLAS OF RADIOGRAPHIC POSITIONS AND RADIOLOGIC PROCEDURES,

5TH ED. C.V. Mosby Company, St. Louis, 1982.

Radioactive chemicals either in the form of individual elements or elements attached to other substances called carriers. They are used in testing the location, size, outline, or function of tissues, organs, vessels, or body fluids. The presence and location of radiopharmaceutical substances in the body are detected by special methods or apparatus that record the radioactivity being emitted. These compounds may also be used to treat certain diseases. Id. at 1553-1554.

RADIOPHARMACEUTICALS

I.

RADIONUCLIDE	IODINE
SYMBOL	^{123}I
PHYSICAL HALF-LIFE	13.3 HOURS
CHEMICAL FORM	SODIUM IODINE
DIAGNOSTIC USE	THYROID FUNCTION AND IMAGING

App. 124

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT COURT OF FLORIDA, TALLAHASSEE DIVISION

RESHARD, PLAINTIFFS,

V. NO. 85-7216-WS

DR. BRITT, ET AL., DEFENDANTS.

_____/

MOTION TO QUASH TAKING OF DEPOSITIONS FROM EXPERT WITNESSES MOTION FOR PROTECTIVE ORDER

Points and Authorities

A. Paragraph 3 of the Scheduling Order issued by this court on April 17, 1990 states the following:

"The parties are reminded that discovery depositions of experts expected to be called as witnesses at trial are subject to the provisions of Rule 26(b)(4)(ii)."

B. Rule 26(b)(A)(ii) states:

Trial preparation: Experts. Discovery of facts known and opinions held by experts, other wise discoverable under the provisions of subdivisions (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(ii): Upon Motion, the court may order further discovery than the scope of discovery in (A)(i) by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate."

Dr. Robert Taylor Letter to Connie Reshard, July 3, 1986:

"Find enclosed a consultation on Minnie Lee Reshard as you requested. As you will note, I have outlined the major features of the case as I saw them. I have commented specifically on the interaction of the various and sundry drugs that were used in Mrs. Reshard's care as well as on the issue of the dissecting aorta aneurysm. As additional information becomes available in regard to Trazodone, I will forward it to your attention."

EXCERPTS FROM DR. TAYLOR'S DEPOSITION TRANSCRIPT:

TRANSCRIPT BY DR. ROBERT TAYLOR
TAKEN IN WASHINGTON, D.C. ON JULY 17, 1990
AT 444 NORTH CAPITOL ST., N.W.
BEFORE ACE FEDERAL REPORTERS, INC.
BEGINNING WITH PAGE 8, LINE 2, ENDING PAGE 9, LINE 22.

William Davis: Dr. Taylor, do you anticipate testifying in the trial in the case that I described earlier?

Dr. Taylor: Well, I'm not aware of the details of the case, the charges that have been levied. So, I'm really not aware of the nature of the case, except by your comments at the beginning of this deposition.

William Davis: The comments that I made on the record?

Dr. Taylor: Yes.

William Davis: Have you formed an opinion such that you are prepared to express an opinion today that any one of the defendants in this case is guilty of medical malpractice?

Dr. Taylor: I do not have an opinion.

William Davis: Could you tell me of the contacts that you have had with counsel for the plaintiffs, Ms. Connie Reshard, with regard to this matter?

Dr. Taylor: Several years ago, and I can't remember the exact year, probably '86 or 87' perhaps, or earlier, it has been that long, I was contacted by Ms. Reshard to review certain records relative to the death of her mother. I discussed those items with her and reviewed the records in her presence briefly, and I might add superficially, and suggested that she seek other experts in the area that I felt were appropriate, specifically cardiology and cardiothoracic surgery. But

other than that contact, there has been no other contact, and specifically there has been no contact since those dates in '86 or 87' until the last week or so.

William Davis: Prior to the last week or so did you provide her with any written reports?

Dr. Taylor: I can't recall that I did. It's possible that I might have back in those dates in '86 or 87'. I looked through my files yesterday and I could not find them, but I've moved from another office recently and they might have been misplaced. There is a possibility that I might have provided her with some information relative to the overall medical condition, but I don't recall that I did.

William Davis: You don't recall expressing an opinion to her that any of these defendants are guilty of medical malpractice, do you?

Dr. Taylor: That's a strong term "guilty" especially in Washington, but the determination of guilt would not be something that I would be an expert at giving. So my opinion would simply be the facts surrounding the medical . . . .

Appellee TCH and its undersigned attorney, William Davis, certified that it had in its possession no further evidence regarding the decedent, on numerous occasions. In response to Plaintiffs' interrogatories and production of documents:

> "**No. 6.**: it stated: What was the last type and dosage of medication and drugs given the decedent before she was found dead?" **Answer:** We have no information beyond that which has been furnished to Plaintiffs. According to those records, she received Inderal 40 m.g., and Isordil 2.5 m.g., at midnight." (R3-122); (R2-94).
>
> "**No.7**.: Prior to answering these interrogatories, and the other interrogatories propounded to you by the Plaintiffs, have you made due and diligent search of defendants books, records and papers, and made diligent inquiry of defendants agents and employees, with a view to eliciting all available information in this action? **Answer**: "yes" *Id.*
>
> "**No. 9**.: Please set forth in complete detail and in chronological

order everything that was done to the decedent, including the name, address, occupation, and title of every person who did anything to the decedent during her hospital stay." **Answer**: "The information sought by Interrogatory 9 is, to the extent of this Defendant's knowledge, contained in and reflected in the medical records of the decedent's hospitalization at [TCH] in August 1983, as supplemented by prior answers to interrogatories herein.", (Ronald E. Rudderman, Assistant Administrator, 8/22/86). *Id.* ***Emphasis Added.***

"**Production No. 4**.: Please produce a true certified copy of all hospital records concerning the treatment of Minnie Lee Reshard . . . ." **Answer**: "Defendant, TCH objects to Plaintiffs' request to provide a [true and certified] copy of all hospital records regarding the treatment of Minnie Lee Reshard . . . on the grounds that this interrogatory is in effect making a request for a production of documents . . . ." (R2-78-2); (R2-103).

"**Production No. 1**: Please provide Plaintiffs with the contents of the third envelope of x-rays . . . Please produce the contents of the missing x-ray envelope. **Answer**: [Defendant objected that it was not in the form of a production request.] *Id.* (*See*, R4-184-4); (R5-222); (R6-275).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONNIE RESHARD AND LEROY RESHARD,
PLAINTIFFS,

VS. CASE NO. 85-7216

DR. EARL BRITT, ET AL.,
DEFENDANTS

_____/

THE DEPOSITION OF: ROSA LEE WALKER-VIRGIL
DATE: THURSDAY, JUNE 28, 1990
TIME: COMMENCED AT 5:00 P.M.
CONCLUDED AT 5:35 P.M.

Page 9, line 9 W. DAVIS, ATTORNEY FOR TCH: Let me ask you in general, over the time that she was there in the hospital up until the last time you saw he, did you notice any change in her condition that you could see"

WALKER-VIRGIL: Change like what?

DAVIS: Well, did she seem sometimes better or sometimes worse or less pain, more pain, sometimes happier or sadder? Did you see any change at all in her over the time she was there?

WALKER-VIRGIL: Not really.

DAVIS: When you were there in the room with her, did you ever see any kind of a medical event? Did you see her like -- I'm asking you, did you see her faint?

WALKER-VIRGIL: No, I didn't.

DAVIS: Did you see her have any evidence of any sickness?

WALKER-VIRGIL: Well, the Friday when I were there I spent most of the time with her. And she was awful tired and was more weak. But it's -- in other words, the doctor wanted her to get out of the bed and walk. So. I walked back -- there was a waiting room off from her room. And I walked with her back and forth and she just said I'm tired, and I helped her to get back in the bed.

DAVIS: What else do you remember about that Friday, anything else? I'd like you to probe your memory.

WALKER-VIRGIL: [discussion of hot night gown, irrelevant]

DAVIS: Yes, ma'am. Is there anything else that you remember about

that Friday?
WALKER-VIRGIL: Well, the doctor -- the nurse gave her something to put under her tongue, I remember that.

Page 11, line 5
DAVIS: Yes, ma'am. Is there anything else that you remember about her or that day in particular that day, Friday?
WALKER-VIRGIL: Other than she kept complaining about --
DAVIS: Being sore in her chest?
WALKER-VIRGIL: No, she said it was hurting.
DAVIS: you're touching your chest?
WALKER-VIRGIL: In the area of her heart. She said it hurt. And she was so -- she was very short of breath.
DAVIS: Were you -- I guess you were also there the day before on Thursday?
WALKER-VIRGIL: Just a little while, probably 15 minutes and I had to get my ride to go home.
DAVIS: When you were there on other days, did you see any nurses come in and give her any pill under her tongue or could you have the days -- are you absolutely sure?
WALKER-VIRGIL: I was just there a few minutes those other days because I didn't see them give anything that day, but they gave her something that Friday I was there because I spent more time with her.

AFFIDAVIT OF LEROY RESHARD JULY 29, 1990
3156 WEYMOUTH DRIVE

A. ON TUESDAY MORNING AUGUST 2, 1983, I SPOKE (BY TELEPHONE) TO DR. EARL BRITT ABOUT MY MOTHER, MINNIE LEE RESHARD, CONCERNING HER ILLNESS. AT THAT TIME, I LIVED IN IRVINE, CALIFORNIA.

I ASKED DR. BRITT WHAT WAS WRONG. DR. BRITT STATED THAT HE THOUGHT THAT MOTHER WAS DEPRESSED. I ASKED ABOUT WHAT. DR. BRITT STATED THAT HE WOULD OBSERVE HER AND RUN DIFFERENT TEST TO DETERMINE WHAT WAS WRONG.

B. I SPOKE TO DR. BRITT AGAIN ON THURSDAY AUGUST 4, 1983 TO OBTAIN RESULTS OF TEST AND PROGRESS ON MY MOTHER. DR. BRITT SAID THAT THERE WAS NOT ANYTHING THAT HE COULD SEE WAS WRONG.

C. DURING THE COURSE OF MY MOTHER'S HOSPITAL STAY, FROM AUGUST 2, 1983 THRU AUGUST 6, 1983, I SPOKE TO HER THREE TIMES. ON AUGUST 2, 1983, MY MOTHER EXPLAINED ABOUT THE CHEST PAIN THAT HAD BROUGHT HER TO THE HOSPITAL. SHE SAID THAT SHE HAD PAIN IN HER CHEST WHICH HAD WOKE HER UP; THAT THE PAIN HAD SPREAD TO HER ARMS AND LEGS AND THEN ALL OVER HER BODY. ABOUT 9:00 P.M. EST ON AUGUST 5, 1983, I SPOKE TO MOTHER AGAIN AND SHE FELT BETTER.

D. ON AUGUST 6, 1983, AFTER LEARNING OF MY MOTHER'S DEATH, I FLEW TO TALLAHASSEE EARLY SUNDAY MORNING AUGUST 7, 1983. I WENT DIRECTLY TO THE HOSPITAL. CONNIE (MY SISTER) WAS ALREADY THERE. I TALKED TO DR. BRITT. I ASKED HIM WHAT HAD HAPPEN? DR. BRITT ACTED AT A LOSS AS WHAT HAPPEN TO CAUSE MY MOTHER'S DEATH. DR. BRITT HAD NOT DETERMINED A DIAGNOSIS. I [ASKED] WHAT WAS THE TREATMENT? DR. BRITT SAID HE HAD GIVEN NITROGLYCERIN EVERYDAY AT 6:00 A.M., EKG TUESDAY IN EMERGENCY ROOM,

MONITORING DEVICE, SERUM BLOOD ANALYSIS. I ASKED WHEN AND WHY WAS SHE TAKEN OFF THE MONITOR. DR. BRITT SAID THE EKG WAS NORMAL, EVERYTHING WAS NORMAL AND OTHER PATIENTS NEEDED THE MONITORING DEVICE MORE THAN SHE DID. HE SAID THE DEVICE HAD BEEN TAKEN OFF ON THURSDAY, AUGUST 4, 1983. DR. BRITT SAID HER BLOOD PRESSURE WAS UP AND DOWN BUT NOTHING TO BE CONCERNED ABOUT. A MS. JENNY SHEPARD, SUPERVISING NURSE STATED THAT MY MOTHER HAS [HAD] BEEN FOUND DEAD ABOUT 6:00 A.M.[AUGUST 6, 1983], DR. BRITT HAD BEEN CALLED AT 6:05 A.M. AND AGAIN AT 6:27 A.M. (THE TIME THE HOSPITAL RECORDED HER DEATH). DR. BRITT ACTUALLY ARRIVED AT THE HOSPITAL AT ABOUT 8:30-9:00 A.M. I WANTED TO REVIEW THE BODY. I DID SO. DR. JERRY HARRIS, THE PATHOLOGIST AND MEDICAL EXAMINER ARRIVED ABOUT 10:15 A.M. IN ORDER TO DO THE AUTOPSY. (8/7/83)1
I AUTHORIZED AN AUTOPSY TO BE PERFORMED FOR ONE PURPOSE, TO DETERMINE THE CAUSE OF DEATH. NO ONE EXPLAINED THAT ORGANS WERE TO BE REMOVED OR ANYTHING ELSE. NO COPY OF THE AUTOPSY AUTHORIZATION WAS GIVEN TO ME.

CONNIE AND I WAITED FOR DR. HARRIS TO PERFORM THE AUTOPSY AND MET WITH DR. HARRIS, DR. BRITT, AND JENNY SHEPARD AFTER THE AUTOPSY HAD BEEN PERFORMED. DR. BRITT ATTENDED THE PERFORMANCE OF THE AUTOPSY. IMMEDIATELY AFTER THE AUTOPSY WAS PERFORMED, DR. BRITT CAME OUT FIRST. HE STATED TO US, (CONNIE , MS. SHEPARD AND MYSELF) THAT THE CAUSE OF DEATH WAS KNOWN AS SOON AS THE BODY WAS CUT OPEN. THERE IT LAY – THE HEART AND SAC FILLED WITH BLOOD. SHE HAD AN ANEURYSM RUPTURE INTO THE PERICARDIUM. DR. HARRIS AND DR. BRITT EXPLAINED FURTHER. ONE OF THEM DREW A DIAGRAM

1

1 Dr. Harris explained that he was a state medical examiner and that the state provided the commission of an autopsy as a public service. His organization had been authorized as medical examiners. He held himself out as a medical examiner for the state of florida.

(ATTACHED) ON A SHEET OF PAPER FROM MY NOTE PAD AND WROTE THE CAUSE OF DEATH DOWN AS WELL. I TOOK NOTES. SHE HAD A DISSECTION OF THE AORTA, HEMOPERICARDIUM WITH CARDIAC TAMPONADE. A HEART MODEL WAS ALSO USED TO SHOW THE LOCATION OF THE ANEURYSM WAS CONFINED TO THE ASCENDING AORTA. DR. BRITT SAID THAT NOTHING COULD BE DONE TO SAVE MY MOTHER'S LIFE. HE SAID THAT PATIENTS DIE 80 PERCENT OF THE TIME. HE SAID THAT THE ANEURYSM COULD NOT BE SEEN ON A PLAIN X-RAY AND HER CHEST X-RAYS HAD BEEN NORMAL AND TO ASSURE HIMSELF, HE HAD A SECOND SET OF X-RAYS ON AUGUST 2, 1983. HIS STATEMENTS REFLECTED THAT THE HAD READ THE X-RAYS HIMSELF. HE SAID AN ANGIOGRAM WAS THE ONLY WAY TO HAVE DETERMINED THE EXISTENCE OF THE ANEURYSM, BUT THERE WAS NO REASON TO DO AN ANGIOGRAM BECAUSE EVERYTHING WAS NORMAL. MY SISTER, CONNIE WAS CONCERNED THAT A WOMAN WITH A LONG HISTORY OF HYPERTENSION WHO HAD SEVERE CHEST PAIN WOULD NOT WARRANT FURTHER TEST AFTER A HEART ATTACH [ATTACK] WAS RULED OUT. DR. BRITT REPEATED THAT NO FURTHER TEST WERE WARRANTED AND HOW WAS HE SUPPOSED TO KNOW SINCE HE HAD NOT SEEN HER SINCE APRIL 1983. DR. BRITT HAD CONTINUED TO MAINTAIN DURING THIS MEETING THAT MOTHER HAD JUST BEEN DEPRESSED. I WAS CONVINCED THAT MY MOTHER'S MEDICAL NEEDS HAD BEEN IGNORED AND SHE HAD SIMPLY BEEN LABELED AS BEING DEPRESSED. THROUGH-OUT THIS MEETING, DR. HARRIS NOR DR. BRITT DID NOT MENTION THAT THEY HAD REMOVED MY MOTHER'S HEART. THE COMPLETE AUTOPSY WAS NOT PERFORMED. DR. HARRIS STATED THAT THE CAUSE OF DEATH HAD BEEN DETERMINED AND NO FURTHER INFORMATION WAS LIKELY. A WRITTEN REPORT WOULD BE ISSUED. CONNIE WANTED A DRUG ANALYSIS DONE, BUT DR. HARRIS SAID THAT NONE WAS NEEDED. CONNIE WANTED TO SEE THE ACTUAL HEART OF OUR MOTHER, BUT THEY WOULD NOT SHOW IT TO HER. I REQUESTED THE HOSPITAL RECORDS AND X-RAYS BUT DID NOT GET THEM AT THAT TIME. WE WERE TOLD TO RETURN ON AUGUST 8, 1983.

D. KEMUEL COX, THE MORTICIAN MET WITH CONNIE AND I SOMETIME THE WEEK OF AUGUST 7, ABOUT THE FUNERAL ARRANGEMENTS. MR. COX STATED THAT SOMETHING [SOMETHING] WAS UNUSUAL ABOUT THE CONDITION OF MY MOTHER'S BODY. THE HEART HAD BEEN REMOVED AND SOME THINGS WERE 'CHOPPED-UP." MR. COX ASKED WHAT SHE DIED FROM. WE TOLD HIM WHAT HAD BEEN TOLD TO US. MR. COX SUGGESTED THAT WE SPEAK TO DR. HARRIS AGAIN AND HE ARRANGED A MEETING. JAMES RESHARD (ANOTHER BROTHER), CONNIE, MR. COX AND I MET WITH DR. HARRIS AT HIS OFFICE, I BELIEVE ON AUGUST 11, 1983. MR. COX REPEATED WHAT HE HAD TOLD US AS THE REASON FO[R] CALLING THE MEETING. DR. HARRIS ACKNOWLEDGED THAT HE HAD REMOVED THE HEART. HE NEVER GAVE A REASON FOR REMOVING IT. CONNIE ASKED WHY AND DEMANDED TO SEE THE HEART. DR. HARRIS SAID NO. JAMES ASKED SOME QUESTIONS.

DR. HARRIS REPEATED ESSENTIALLY WHAT HE HAD SAID ON AUGUST 7, 1983. THE ANEURYSM HAD BEEN LOCATED IN THE ASCENDING AORTA JUST ABOVE THE HEART. IT HAD RUPTURED AT THE BASE OF THE AORTA, FILLING THE HEART SAC WITH BLOOD, CAUSING CARDIAC ARREST AND DEATH.

E. DURING THE WEEK OF AUGUST 7, 1983, JAMES ACCOMPANIED ME TO PICK UP THE X-RAYS AND RECORDS. I HAVE X-RAYS AND HOSPITAL RECORDS LISTED AS WHAT I REQUESTED, BUT MS. SHEPARD DID NOT GIVE US THE X-RAYS, JUST A COPY OF THE HOSPITAL RECORDS. (I AM AWARE THAT THE SET OF RECORDS I FIRST RECEIVED FROM THE HOSPITAL AT THIS TIME AND A SET THAT CONNIE WOULD OBTAIN LATER ARE DIFFERENT.) IN THE HOSPITAL RECORDS, THERE WAS A ONE PAGE TYPEWRITTEN REPORT WHICH HAD BEEN PREPARED BY A PSYCHIATRIST, DR. CHOKHAWALA. I DO NOT RECALL THE SPECIFIC CONTENTS, BUT THE REPORT HAD BEEN BASED ON SEVERAL VISITS WITH MY MOTHER. THE WEEK AFTER THE

FUNERAL,2 AUGUST 14, 1983, CONNIE AND I MET WITH A ELWIN THRASHER ABOUT PROBATE OF THE ESTATE AND CONCERNS ABOUT MY MOTHER'S DEATH. OUR AUNT TOMMYE LEE CARR WAS WITH US BUT REMAINED UN THE CAR. I GAVE MR. THRASHER MY FOLDER WHICH CONTAINED THE HOSPITAL RECORDS, INCLUDING THE PSYCHIATRIST TYPEWRITTEN REPORT MENTIONED JUST ABOVE. ALSO, INCLUDED, WAS THE ORIGINAL MEDICAL FORM FOR THE FLORIDA RETIREMENT SYSTEM. THIS FORM HAD BEEN COMPLETED BY DR. EARL BRITT. CONNIE HAD GIVEN IT TO ME BECAUSE I HAD INTENDED TO WRITE DR. EARL BRITT A LETTER. [ABOUT THE CONTENTS OF THE DOCUMENT WHICH CONTRADICTED WHAT HE HAD TOLD LEROY ON AUGUST 7, 1983 ABOUT THE HISTORICAL MEDICAL DIAGNOSIS HE HAD MADE REGARDING THE DECEDENT DURING THE COURSE OF HIS MEDICAL TREATMENT.] THE INFORMATION REGARDING MY MOTHER'S CARDIOVASCULAR DISEASE IN THIS REPORT WHICH HAD BEEN EXECUTED IN 1983 WAS INCONSISTENT WITH DR. BRITT'S ASSESSMENT REGARDING MY MOTHER'S CARDIOVASCULAR HEALTH AT THE TIME OF HER DEATH ON AUGUST 7, 1983. IT WAS ALSO IN MY FILE, THE ONE GIVEN TO ELWIN THRASHER. THIS FORM AND DR. CHOKHAWALA'S TYPEWRITTEN REPORT DISAPPEARED FROM FILE AFTER THE MEETING WITH THRASHER. WE NOTED THAT THRASHER HAD DEPT THE DOCUMENTS.

LATER, CONNIE WOULD MENTION THE DISAPPEARANCE OF THE CHOKHAWALA DOCUMENT FROM THE OFFICIAL HOSPITAL FILE AFTER SHE REVIEWED THE HOSPITAL RECORDS A COUPLE OF WEEKS AT THE END OF AUGUST 1983. CONNIE ASKED ME TO ASK THRASHER ABOUT IT BUT HE DENIED TAKING ANY OF THESE RECORDS. CONNIE ALWAYS EXPRESSED CONCERN THAT THRASHER WAS DELIBERATELY STALLING ON REVIEWING THE MEDICAL RECORDS AND THAT THE DELAY WOULD HURT US. SHE EXPRESSED CONCERNS THAT HIS CONDUCT WAS LEGALLY

---

2 Thrasher is an attorney. It was apparent during our meeting with thrasher that he knew dr. Chokhawala. Connie had been very concerned about dr. Chokhawala's involvement in mother's case.

UNETHICAL. HE DID NOT REVIEW THE RECORDS UNTIL JANUARY 1984 AND DID NOT ASK FOR THE X-RAYS. ADDITIONALLY, DURING MY DEPOSITION ON JUNE 27, 1990, THE LAWYERS FOR THE DEFENDANTS PRESENTED SEVERAL DIFFERENT DOCUMENT TO ME, BUT NONE WAS THE REPORT WHICH HAD BEEN IN THE MEDICAL RECORDS PREPARED BY DR. CHOKHAWALA.

I WOULD BE HAPPY TO SUBMIT TO A POLYGRAPH TEST. [I ASKED THAT THIS STATEMENT BE ADDED IN ORDER TO SUBMIT THE DOCUMENTS TO THE STATE OF FLORIDA MEDICAL REGULATORS BECAUSE SUCH TEST CAN BE SUBMITTED IN THE ADMINISTRATIVE RECORDS. PER CONNIE RESHARD]

SWORN BEFORE ME _____ ON JULY 30 1990. /S/ROSE ANN WILCOX____/S/____NOTARY PUBLIC,
LEROY RESHARD
GEORGIA STATE AT LAWS
ATTACHMENT

AFFIDAVIT OF JAMES RESHARD

ADDRESS: 194 RUSHMORE STREET
WESTBURY, NEW YORK

DATED JULY 21, 1990

A. THE FIRST TIME I SPOKE TO MY MOTHER, MINNIE LEE RESHARD, DURING HER ILLNESS WHICH BEGAN ON AUGUST 2, 1983 TO AUGUST 6, 1983, WAS AUGUST 3, 1983. IT WAS ABOUT 3 O'CLOCK P.M. WHEN I TELEPHONED HER FROM NEW YORK AT TALLAHASSEE COMMUNITY HOSPITAL IN TALLAHASSEE, FLORIDA.

I ASKED HER HOW SHE FELT. SHE SAID THAT A PSYCHIATRIST HAD BEEN TO SEE HER AND TREATED HER LIKE SHE WAS CRAZY. THE PSYCHIATRIST HAD ATTEMPTED TO GIVE HER A TEST. HE ASKED HER HOW BIRDS FLY. SHE TOLD HIM HOW MUCH PAIN SHE WAS HAVING AND REFUSED TO TALK TO HIM.

WE TALKED A LITTLE BIT MORE, BUT WHAT PUZZLED ME WAS THAT A PSYCHIATRIST WAS TRYING TO GIVE HER A TEST WHILE SHE KEPT TELLING HIM SHE WAS IN PAIN.

B. ON AUGUST 5, 1983 I HAD THE FOLLOWING TELEPHONE CONVERSATION WITH MY MOTHER DURING VISITING HOURS, ABOUT 7:30 P.M. MY UNCLE THOMAS RESHARD, JR., HIS WIFE, ERNESTINE RESHARD, AND MY GRANDFATHER, THOMAS RESHARD, SENIOR WERE VISITING.

I ASKED MY MOTHER HOW SHE FELT. SHE SAID THAT SHE HAD SO MUCH PAIN THAT SHE DID NOT THINK SHE WOULD HAVE MADE IT [DIED], BUT THE DOCTOR HAD GIVEN HER MEDICINE FOR THE PAIN. SHE DID NOT HAVE ANY PAIN AT THAT TIME, BUT WAS SOUNDING VERY DROWSY. WE DID NOT TALK LONG. THE

FOLLOWING MORNING, AUGUST 6, 1983, MY UNCLE, DENNIS RESHARD, TELEPHONED ME THAT MY MOTHER HAD DIED.

C. WHILE IN TALLAHASSEE, THE WEEK OF AUGUST 7, 1983 9TH, 10TH, 11TH), I WENT WITH LEROY RESHARD TO THE HOSPITAL (TALLAHASSEE COMMUNITY HOSPITAL) TO PICK-UP MY MOTHER'S MEDICAL RECORDS AND WE WERE TOLD THAT THE MEDICAL RECORDS WERE NOT READY YET. WE RETURNED THE NEXT DAY. THIS TIME THE RECORDS WERE GIVEN TO US, BUT SOME PAGES WERE NOT GIVEN. I DO NOT KNOW WHAT PAGES WERE KEPT BY THE BLOND HAIRED WOMAN. SHE ALSO RECOPIED SOME PAGES WHICH WERE NOT CLEAR.

D. LATER, MY SISTER AND BROTHERS WERE TOGETHER BEFORE I LEFT FLORIDA AFTER MY MOTHER HAD PAST. WE DISCUSSED A ONE PAGE DOCUMENT WHICH HAD BEEN PREPARED BY THE PSYCHIATRIST. MY SISTER CONNIE RESHARD, HAD READ THE REPORT AND WAS HOLDING IT IN HER HAND. SHE SAID THAT THE DOCTOR HAD CONCLUDED MY MOTHER WAS CRAZY. I WAS SHOCKED ABOUT ANYONE SAYING MY MOTHER [WAS] CRAZY. MY MOTHER DROVE AUNT MABLE SMITH TO WORK EVERY DAY. SHE DID HOUSE WORK AND KEPT MY SISTER'S BRENDA KID AS WELL AS MY SISTER BELINDA'S TWO KIDS. CONNIE SAID OVER AND OVER HOW COULD HE WRITE THIS AND WAS SCREAMING. THIS PAPER HAD BEEN IN THE MEDICAL RECORDS OBTAINED FROM THE HOSPITAL THAT SHE HELD IN HER HAND.

E. DURING THE WEEK OF AUGUST 7, ABOUT THE 11TH, 1983, I MET WITH CONNIE RESHARD, THE PATHOLOGIST, LEROY RESHARD AND THE MORTICIAN AT THE PATHOLOGIST OFFICE. THE MORTICIAN HAD BEEN CONCERNED THAT SOMETHING WAS WRONG ABOUT WHAT MY MOTHER DIED OF BECAUSE OF THE CONDITION OF THE BODY AND THE FACT THE HEART HAD BEEN REMOVED.

THE PATHOLOGIST EXPLAINED ABOUT THE ANEURYSM.

I HAD ONE QUESTION TO ASK: HOW BLOOD GOT INTO THE HEART SAC?

THE PATHOLOGIST EXPLAINED THAT THE ANEURYSM WAS LOCATED ABOUT AN INCH FROM THE HEART. THE SPLIT BULGED LIKE A CAR TIRE DOES WHEN IT SEPARATES, SPLIT, AND BLOOD FLOWED INTO THE SPLIT AREA. THE BLOOD FLOWED BACK INTO THE HEART SAC CAUSING THE HEART NOT TO BEAT. THE SPLIT WAS LOCATED ONLY IN THE ASCENDING AORTA, UP TO THE TOP; IT HAD NOT TURNED DOWN. [DOWN THE ARCH TO THE DESCENDING AORTA OR OTHER BRANCHES].

MY SISTER CONNIE RESHARD, WAS CONCERNED THAT MOTHER'S HEART HAD BEEN REMOVED. THE PATHOLOGIST NEVER ANSWERED CONNIE. CONNIE WANTED TO SEE THE HEART BUT THE PATHOLOGIST SAID NO, IT WOULD UPSET HER. SHE ALSO WANTED TO HAVE TISSUE SAMPLES TESTED FOR DRUGS ADMINISTERED TO OUR MOTHER, BUT THE PATHOLOGIST [PATHOLOGIST] SAID TOO LATE BECAUSE THE ONLY THING HE HAD WAS HER HEART. HE SAID HE HAD NO TISSUE SAMPLES.

I WOULD BE HAPPY TO SUBMIT TO A POLYGRAPH TEST.[I ASKED IF HE WOULD SUBMIT TO A POLYGRAPH TEST IN ORDER TO USE THE SAME AFFIDAVIT FOR USE BY STATE OF FLORIDA REGULATORS IN ADMINISTRATIVE PROCEEDINGS.]
SWORN BEFORE ME ON JULY 21, 1990.
/S/
HENRY P. CUNNINGHAM
NOTARY PUBLIC STATE OF NEW YORK
NO. 41-4841642
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES MARCH 30, 1991
/S/
JAMES RESHARD

AFFIDAVIT OF TOMMYE LEE CARR

ADDRESS: 4 STEWART AVENUE
HEMPSTEAD, NEW YORK 11550

JULY 21, 1990

I ACCOMPANIED MY NIECE, CONNIE RESHARD AND MY NEPHEW, LEROY RESHARD [IN AUGUST 1983 WAS THE ONLY TIME CONNIE AND LEROY TOGETHER EVER SAW A LAWYER ABOUT THEIR MOTHER'S DEATH] TO SEE A LAWYER ABOUT THE DEATH OF THEIR MOTHER, MINNIE LEE RESHARD. I STAYED IN THE CAR.

AFTER THE MEETING IN THE CAR, CONNIE WAS STRAIGHTENING THE HOSPITAL RECORDS AND FLIPPING THROUGH THEM. SHE SAID THAT THE PSYCHIATRIST REPORT WAS NOT THERE AND THE LAWYER HAD KEPT IT. LEROY COMMENTED THAT WE COULD GET IT THE NEXT DAY BECAUSE WE HAD TO COME BACK ABOUT THE PROBATE OF THE ESTATE. CONNIE SAID OKAY AND DID NOT GO BACK INSIDE AT THAT TIME FOR THE DOCUMENT. WE DROVE AWAY.

I WOULD BE HAPPY TO SUBMIT TO A POLYGRAPH TEST. [AGAIN THE REASON FOR THE POLYGRAPH STATEMENT IS FOR SUBMISSION OF THE AFFIDAVIT TO AN ADMINISTRATIVE BODY, STATE OF FLORIDA REGULATORS.]

SWORN BEFORE ME ON JULY 21, 1990.

/S/
HENRY P. CUNNINGHAM
NOTARY PUBLIC, STATE OF NEW YORK
NO. 41-4841642
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES MARCH 30, 1991

/S/
TOMMYE LEE CARR

Supreme Court, U.S.
FILED
OCT 3 1997
CLERK

No. 97-384

In The

Supreme Court of the United States

October Term, 1997

CONNIE C. RESHARD and LEROY RESHARD, as Co-Personal Representatives of the Estate of Minnie Lee Reshard,

Petitioners,

v.

DR. EARL BRITT; DR. GEORGE BONK; DR. PANKAJ CHOKHAWALA; DR. DAVID MOORE; TALLAHASSEE MEDICAL CENTER, INC., d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT TALLAHASSEE COMMUNITY HOSPITAL'S BRIEF IN OPPOSITION

William Howard Davis
Counsel of Record
Wadsworth & Davis, P.A.
203 N. Gadsden Street, Suite 1
Post Office Box 10529
Tallahassee, Florida 32302-2529
(904) 224-9037

Attorneys for Respondent Tallahassee Medical Center, Inc. d/b/a Tallahassee Community Hospital

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF THE CASE AND FACTS 3

1. Adoption of the Trial Court Order and the Appellate Decision in *Reshard II* 3

2. *Reshard III*: The Trial Court Sets Fees and Costs Incurred and Petitioners Default on Appeal .. 6

   A. Trial-Level Fees of Respondent Tallahassee Community Hospital 7

   B. Appellate Fees of Respondent Tallahassee Community Hospital 8

   C. The Course of Proceedings Below: Obstinate Refusal to Prosecute the Appeal 10

REASONS WHY THE PETITION SHOULD BE DENIED 15

1. The Court of Appeals Properly Determined that the Trial Court Dismissal of the Petitioners' Complaint had been Resolved in *Reshard II* 15

2. It Was Within the Discretion of the Court Below to Limit the Scope of Briefing and to Thereafter Dismiss the Appeal When the Petitioners Refused to Comply 19

TABLE OF CONTENTS

Page

3. Argument Petitioners Abandoned – that the District Court Abused its Discretion in Determining the Amount of Attorneys' Fees – is Meritless 22

4. The Continued Pendency of this Twelve-Year-Long Wrongful-Death Case – Dismissed as a Sanction in 1991 – is an Embarrassment that Ought Not to be Prolonged or Endured by this Court..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Dunn, 19 U.S. 204 (1821) 20

Andrews v. Employees' Retirement Plan, 938 F.2d 1245 (11th Cir. 1991) 17

Barber v. American Sec. Bank, 841 F.2d 1159 (D.C. Cir. 1988) 21

Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988) 16

Burger King Corp. v. Pilgrim's Pride Corp., 15 F.3d 166 (11th Cir. 1994) 18

Britton v. Co-op Banking Group, 916 F.2d 1405 (9th Cir. 1990) 15

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 20

Cleveland v. Berkson, 878 F.2d 1034 (7th Cir. 1989) 17

CNPq-Conselho Nacional v. Inter-Trade, Inc., 50 F.3d 56 (D.C. Cir. 1995) 23

Cooper v. Salomon Bros., Inc., 1 F.3d 82 (2d Cir. 1993), *cert. denied*, 510 U.S. 1063 (1994) 16

Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675 (D.C. Cir. 1996) 17

Gilmere v. Atlanta, 931 F.2d 811 (11th Cir. 1991) 22

Hensley v. Eckerhart, 461 U.S. 424 (1983) 22

In re Holywell Corp., 967 F.2d 568 (11th Cir. 1992) 23

King v. McCord, 621 F.2d 205 (5th Cir. 1980) 22

Link v. Wabash, 370 U.S. 626 (1962) 20

TABLE OF AUTHORITIES – Continued

Page

MacNeil Bros. Co. v. Forte, 253 F.2d 500 (1st Cir. 1958) 21

Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671 (5th Cir. 1982) 15

Norman v. Housing Authority of Montgomery, 836 F.2d 1292 (11th Cir. 1988) 23

Reshard v. Britt [Reshard I], 839 F.2d 1499 (11th Cir. 1988) 1

Reshard v. Britt [Reshard II], 976 F.2d 742 (11th Cir. 1992), *reh'g en banc denied*, 981 F.2d 1264, *cert. denied*, 508 U.S. 911 (1993) ..... *passim*

Reshard v. Comm. on Admissions for Dist. of Columbia Court of Appeals, 507 U.S. 988 (1993) 13

Resolution Trust Corp. v. Hallmark Builders, Inc., 996 F.2d 1144 (11th Cir. 1993) 23

Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132 (4th Cir. 1988) 21

Taylor v. S & D Enterprises, Ltd., 601 F.2d 175 (5th Cir. 1979) 21

Thomas v. Arn, 474 U.S. 140 (1985) 20

Turnbull v. Wilcken, 893 F.2d 256 (10th Cir. 1990) 17

United States v. Consolidated Freightways, Inc., 178 F.2d 756 (9th Cir. 1949) 21

United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) 15

Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983) 15

TABLE OF AUTHORITIES – Continued

Page

RULES:

Fed. R. App. P. 3(a) 20

Fed. R. Civ. P. 72 (Committee Notes)..... 24

RESPONDENT TALLAHASSEE COMMUNITY HOSPITAL'S BRIEF IN OPPOSITION

The Respondent, Tallahassee Medical Center, Inc., d/b/a Tallahassee Community Hospital [hereinafter Tallahassee Community Hospital],[1] respectfully requests this Honorable Court to deny the petition for the issuance of a writ of certiorari.

OPINION BELOW

The pertinent decisions of the United States Court of Appeals for the Eleventh Circuit, in this case, are as follows:

In *"Reshard II"*[2]
(The 1991 Appeal)

PER CURIAM:

> The issues Appellant raises in this appeal are meritless. *The district court committed no error, much less an abuse of its discretion, in* (1) refusing

---

[1] The identities of all the Parties are included in the style of the case. The parent company of Respondent Tallahassee Medical Center, Inc., d/b/a Tallahassee Community Hospital is Columbia/HCA Healthcare Corporation. Tallahassee Medical Center, Inc., has no subsidiaries that are not wholly owned. Sup.Ct.R. 29.1.

[2] *Reshard I* affirmed an early Order of the Trial Court that Petitioners, in their representative capacities as Co-Personal Representatives of an Estate, could not appear *pro se*. *Reshard v. Britt*, 839 F.2d 1499 (11th Cir. 1988). On remand, Connie Reshard, a member of the Bar of the Commonwealth of Pennsylvania, appeared herein, *pro hac vice*, as Counsel for Appellants.

> to disqualify defense counsel; (2) refusing to grant the plaintiffs a default against the defendants; and (3) in *dismissing plaintiffs' wrongful death action with prejudice. Every finding of fact complained of is well supported by the record, and the court properly applied the law to each such finding.*
>
> AFFIRMED.

Reshard v. Britt, 976 F.2d 742 (11th Cir. [Case No. 91-3542] 1992), *reh'g en banc denied*, 981 F.2d 1264 (11th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993) (emphasis added) (*Reshard II*). Appendix to Petition for Certiorari at 34 [hereinafter cited as "Pet. App." followed by the appropriate page number].

In *"Reshard III"*
(The Decision Below)

> ORDER:
>
> Appellee Tallahassee Medical Center, Inc.'s motion to strike Appellants' corrected brief is GRANTED. Appellants are ORDERED to file a corrected brief deleting all arguments that the district court's dismissal of their complaint was improper. This issue was resolved against Appellants in 91-3542 [*Reshard II*].

Pet. App. at 10 (Order dated September 25, 1996).

> Appellants' "motion to vacate orders," construed as a motion to reconsider this court's 9/25/96 order striking a portion of Appellants' brief is DENIED. If Appellants do not file a corrected brief in full compliance with the 9/25/96 order within 14 days of the date of this order, the clerk is directed to dismiss this appeal

> for want of prosecution, *regardless* of whatever motions or pleadings Appellants may file.

Pet. App. at 5 (Order dated November 14, 1996).

> Appellants' "motion to vacate appeal no. 91-3542" is DENIED.
>
> Appellants' "motion for vacation by merits panel," construed as a motion for reconsideration of this court's 11/14/96 order, is DENIED.
>
> Appellee Tallahassee Medical Center's "suggestion to clerk for entry of court-ordered dismissal," construed as a motion to dismiss this appeal based on Appellants' non-compliance with this court's 11/14/96 order, is GRANTED.

Pet. App. at 3.

STATEMENT OF THE CASE AND FACTS

1. Adoption of the Trial Court Order and the Appellate Decision in *Reshard II*

This medical-malpractice case has been in litigation since 1985. In 1991, the District Court entered an Order dismissing Petitioners' Complaint with prejudice and requiring Petitioners to "pay to [Respondents] their expenses, including attorneys' fees, for all work and expenses related to [certain discovery proceedings]." Pet. App. at 36-38, 44. In so doing, the Trial Court adopted an Order, Report and Recommendation issued by the Magistrate Judge. Pet. App. at 44.

The Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit, where the District

Court's Order was affirmed. *Reshard v. Britt*, 976 F.2d 742, *reh'g en banc denied*, 981 F.2d 1264 (11th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993) ("every finding well supported" and law "properly applied") (hereinafter cited as *Reshard II*). However, the case was remanded so that the *amount* of the fees, to be taxed pursuant to the affirmed order, could be determined. From the Order setting that amount, the instant appeal was taken to the Court of Appeals below, where the appeal was dismissed for lack of prosecution. Pet. App. at 3 (that decision hereinafter cited as *Reshard III*). Petitioners now seek discretionary review of that dismissal.

The most telling item in the massive Record below is the sixty-three page Order, Report and Recommendation of the United States Magistrate, adopted and affirmed in *Reshard II*. R10-376; Pet. App. at 44. Expressly "based upon documents filed in this case, answers to interrogatories, transcripts of depositions, orders entered by this court, affidavits, and statements made to this Court by counsel . . . in hearings," it is replete with citations to the balance of the Record and it has been twice reviewed and upheld. Some of the more salient facts, set forth and documented there, are these:

(1) Petitioners, dating back to 1986, have "an extensive history of dilatory behavior" in this case, which has "continued unabated." R10-376-57.

(2) By their "numerous spurious motions . . . , frivolous but lengthy appeals of every order entered by the magistrate, and finally, willful disobedience" of court order, Petitioners have carried out a concerted campaign,

that began in 1986, to block the progress of this litigation. R10-376-57.

(3) Petitioners have made false statements of fact in sworn answers to interrogatories. R10-376-53, 58.

(4) Petitioner Connie Reshard has testified falsely, on deposition in this case, concerning substantive matters. R10-376-53.

(5) Petitioner/Petitioners' Counsel Connie Reshard has knowingly made false statements to the Court upon which the Court and opposing counsel relied. R10-376-39, 53.

(6) Petitioners willfully disobeyed a Trial Court order . . . and willfully attempted to obstruct the Trial Court by instructing a witness not to obey a lawful Subpoena. R10-376-53.

(7) Petitioners have been engaged in a "bad faith" and "intentional effort . . . to cause needless expense to [Respondents]." R10-376-36.

(8) Petitioners have made false and demonstrably baseless statements of medical "fact," in an effort to bolster claims that Respondents had destroyed evidence. R10-376-10.

(9) Petitioners have engaged in a "vindictive abuse of the adjudicative process," using it in the "malicious accusation" of those who oppose them. R10-376-11, 12.

(10) Petitioners have engaged in the "willful distortion of the plain words of this court's orders . . . throughout the unfortunate history of this case." R10-376-17, n.4.

It was upon these and similar findings, that the District Court ordered the dismissal of the Petitioners' Complaint with prejudice and awarded fees and costs incurred directly as a result of Petitioners' abuses. The Court directed the Magistrate to determine the precise amount of such fees incurred by Respondents; but, before that amount was set by the Magistrate, the Petitioners took the appeal in what became *Reshard II*. The Court of Appeals affirmed the dismissal and the award of fees and costs and remanded the case for a determination of the precise amount of the fees and costs incurred, and this Court denied certiorari. *Reshard II*.

2. *Reshard III*: The Trial Court Sets Fees and Costs Incurred and Petitioners Default on Appeal.

In the 1991 Sanctions Order, affirmed in *Reshard II*, the presiding Judge referred the matter of the *amount* of the awarded attorneys' fees and expenses, incurred as a result of Petitioners' misconduct, to the Magistrate Judge. R10-396-4. The Magistrate Judge gave Respondents thirty days within which to file affidavits documenting the fees and costs incurred, and gave Petitioners thirty days thereafter within which to file a "response and counter-affidavits." R10-397-1, 2. In the same Order, the Magistrate Judge required that any party, desiring an evidentiary hearing, "make such request by motion showing good cause why this matter cannot be determined on motions and affidavits, and responses thereto, without oral argument or evidentiary hearing." *Id*.

When Petitioners appealed in *Reshard II*, the Magistrate Judge stayed the fee-setting proceedings (R10-422-2), pending remand from the appellate court. Then, upon receipt of the Mandate from the Court of Appeals in *Reshard II*, affirming the District Court in every respect, the Magistrate Judge vacated the stay and again invited further evidentiary submissions from the parties. R11-439-3.

A. Trial-Level Fees of Respondent Tallahassee Community Hospital

In response to the Trial Court's orders, Respondent Tallahassee Community Hospital documented pertinent attorneys' fees and, in so doing, it submitted the affidavits of its counsel (R10-408 at Ex. A) and of another attorney (*id.*, at Ex. B) who was familiar with prevailing rates for legal services.[3] Although the United States Magistrate Judge had invited Petitioners to respond with "counteraffidavits" (R10-397-1, 2), Petitioners declined to

---

[3] Those affidavits contained a detailed description of the work performed, counsel's experience, and counsel's range of hourly rates at the time, and stated that this Respondent had been billed at the lowest end of that range. R10-408 at Ex. A. The supporting affidavit stated that the witness was familiar with the prevailing rates charged in the community and with counsel for this Respondent, and opined that a reasonable hourly rate for said counsel in the instant case was actually higher than that charged and sought. *Id.* at Ex. B. Other Respondents tendered affidavits as well, pertaining to their respective fees and costs. R10-407, R10-410; R10-411; R10-412; R10-413; R10-414; R10-415; R10-416; R11-454; R11-458.

submit evidentiary material of any kind, nor did Petitioners request an evidentiary hearing.

After the affirmance and remand in *Reshard II*, the Magistrate again invited Petitioners to respond to the aforesaid "filings already of record" (R11-439-3); but Petitioners' again declined, and the Magistrate Judge adjudicated the matter. In so doing, the Magistrate Judge entered a Report and Recommendation which determined that the total hours devoted by counsel for this Respondent, for pertinent work before the Trial Court, was reasonable; and that the hourly rate charged for that was also reasonable. R11-446-4.

The Magistrate Judge allowed Petitioners fifteen days, after service of the Report and Recommendation, within which to "serve and file specific, written objections." *Id.* at 6. Petitioners filed an untimely response, twenty-four days later, in which they alleged generally that the Magistrate erred in determining both the number of hours and the hourly rate. R11-447-3. Thereafter, District Judge Stafford, "upon review of the submitted affidavits, and exercising [his] own judgment," and also having expressly considered Petitioners' untimely objections, adopted that portion of the Magistrate Judge's Report and Recommendation concerning this Respondent's attorney's fees and expenses for pertinent work before the Trial Court. R11-452-2, 3, 6.

B. Appellate Fees of Respondent Tallahassee Community Hospital

In the hope of deterring endless, frivolous appeals, this Respondent had also requested – in the Circuit Court

of Appeals – an award of such attorneys' fees for *Reshard II*. R11-442. The Court of Appeals granted the request in *Reshard II*, and it remanded for determination of the amount of appellate fees (along with the amounts of trial-court fees, in favor of each Respondent, the imposition of which it had affirmed). R11-440-1. Accordingly, this Respondent submitted, to the District Court, a copy of its Petition for Appellate Attorneys' Fees as originally filed in the Court of Appeals (which included corroborating affidavits). R11-442, Ex. A, B. Again, Petitioners filed no counteraffidavits or other evidentiary materials.

On July 27, 1993, the Magistrate Judge issued a Report recommending that the District Court enter judgment against Petitioners, for the proven amount of appellate fees, consistent with the Court of Appeals remand. R11-446-6. On review, District Judge Stafford determined that additional differentiation of appellate work was necessary. R11-452-5. Thus, the District Court directed this Respondent (and some of the other Respondents, regarding trial-court work) to submit "further itemization" (*id.* at 5) and remanded the matter to the Magistrate Judge for further consideration. *Id.* at 6. In response thereto, this Respondent submitted a sixteen-page affidavit reciting, in detail, the time devoted to specific tasks performed during the appeal. R11-455-Ex. A.

The Magistrate Judge entered an Order, on July 28, 1994, giving Petitioners until September 2, 1994, within which to "file objections, evidence and argument in reply" to this submission, as well as to similar submissions of certain other Respondents. R11-456-2. Petitioners then requested an extension of time, until September 12, 1994 (R11-464-2); and the Magistrate Judge extended their

time further, to October 7, 1994. R11-466-1. On October 11, 1994 (four days after the extended date), Petitioners filed their Response, yet they again failed to submit any counteraffidavit or other evidentiary material. R11-467.

The Magistrate Judge, in his ensuing Report and Recommendation, found that the number of hours expended by Counsel for this Respondent, in connection with the appeal in *Reshard II*, was reasonable. *Id.* at 5-7. Thereafter, Petitioners filed an untimely, undocumented and unverified Response (R11-470); and, after considering this Response, District Judge Stafford concluded that the Report and Recommendation should be adopted. R12-478-1, 2. Accordingly, a Judgment, determining the amount of attorney's fees and expenses, as to all Respondents, was entered on September 19, 1995. R12-479-1. *Reshard III*, followed by the instant Petition, ensued.

C. The Course of Proceedings Below: Obstinate Refusal to Prosecute the Appeal

In their appeal of the fee determination, Petitioners were over three months late in serving instructions regarding the compilation of the Trial Court record and in serving a required Civil Appeal Information Statement, before the first Motion to Dismiss [the appeal] for Lack of Prosecution was filed. Nevertheless, Petitioners did not file those required documents until weeks after the filing of that Motion. Thereafter, this Respondent filed a response to the Petitioners' Civil Appeal Information Statement, pointing out that the issues described therein had been previously decided in *Reshard II*. Petitioners replied with a "Response to Appellee's Objections" which

was filled with false and frivolous accusations against this Respondent, and it was ordered stricken by the Court of Appeals.

Petitioners' Initial Brief below was filed on the last permissible day; and it re-argued the issues that had already been appealed and decided in *Reshard II*, it exceeded applicable page limitations, and it did not comply with other rules regarding format. Petitioners then filed an unauthorized, re-written second "Initial Brief," representing that the second Brief was merely a printed copy of the first. The Clerk notified Petitioners that their second Brief did not conform to format requirements and directed the Petitioners to submit a "Corrected Brief" that remedied those deficiencies; and, on August 29, 1996, the Petitioners filed a third Initial Brief, which likewise failed to comply with the Court's procedural rules regarding the number of permissible pages.

In the meantime, on August 26, 1996, this Respondent moved the Court to strike the Initial Briefs, largely on the grounds that "the vast majority [of each brief] simply reargues the same issues that have been appealed to *and* already decided by this Court in Case No. 91-3542 [*Reshard II*];" and because Petitioners'/Appellants' excuse for that re-argument, i.e., that the appellate court lacked jurisdiction in *Reshard II*, was meritless. In response to that Motion, Petitioners again argued that the 1992 affirmance of the dismissal, *Reshard II*, was void for lack of jurisdiction. The Court below resolved the matter on September 25, 1996, when it issued the following Order:

> [Petitioners] are ORDERED to file a Corrected Brief deleting all arguments that the District Court's dismissal of their Complaint was

> improper. This issue was resolved against Appellants in 91-3542.

Pet. App. at 10. That Order was followed by Petitioners' "*Confidential* [sic] Amendment to Motion to Vacate Orders . . . ," thoroughly re-briefing their claim that the Court of Appeals lacked jurisdiction in *Reshard II* and that it lacked the authority, in *Reshard III* (the instant case), to have ordered the Petitioners to file a Corrected Brief "deleting all arguments that the District Court's [previously affirmed] dismissal of their Complaint was improper." Upon review of this and like motions for reconsideration, filed by Petitioners, the Court below reaffirmed its September 25, 1996, Order; and it spelled out the sanction that would befall Petitioners should they choose to ignore it:

> If Appellants do not file a Corrected Brief in full compliance with the 9/25/96 Order [so as to delete "all arguments that the District Court's dismissal of their Complaint was improper"] within 14 days of the date of this order, the Clerk is directed to dismiss this appeal for want of prosecution. . . . "

Pet. App. at 5. (TJOFLAT, ANDERSON and BIRCH, Circuit Judges) (Dated November 14, 1996).

On or about November 29, 1996, Respondents served their fourth, "Corrected" Brief; and, on Page 14 thereof, counsel for the Petitioners acknowledged their awareness of the above-quoted Order of November 14, 1996. Yet, at page xxi of the subject Brief, Petitioners claimed that the primary "issue" remained "whether sanction of dismissal of the wrongful death issue [was] . . . consistent with the requirements of due process"; and the first ten pages of

the Petitioner's "Statement of the Case" dealt exclusively with the propriety of the District Court's previously affirmed dismissal, as did the entirety of the Petitioner's "Statement of FACTS." The "Summary of Argument" portion of the subject Brief opened with the argument that the "dismissal of this case," by "the District Court Judges," should be vacated; and most of the "Argument" portion of the subject Brief flagrantly reargued – not that the *Reshard II* Court lacked jurisdiction – but that "it was an abuse of discretion [for the District Court] to dismiss the case." "Appellants Corrected Brief November 27, 1996" at 41. Finally, the bulk of Petitioner's "Conclusions" section was devoted to Petitioners' well-worn *Reshard II* charges that the District Court's "*dismissal* of this case should be vacated" [emphasis added] because of alleged "bias," "fraud" and the "tampering of the record" (by, Petitioners argue, virtually everyone involved in the case but them, including court personnel). *Id.* at 54.[4]

---

[4] In other litigation, Petitioners' counsel has frequently made similar accusations, some of which are reflected in the record of other proceedings of this very Court. Thus, in her Appendix to her Petition for Writ of Certiorari filed in this Court in *Reshard v. Comm. on Admissions for Dist. of Columbia Court of Appeals* (Case No. 92-1290), 507 U.S. 988 (1993), Petitioner/Petitioners' counsel, Connie Reshard [*sub nom.* "C. Cornelia Reshard, Esquire"], acknowledged that the District of Columbia Court of Appeals Committee on Admissions to the Bar had expressed concerns

> "about allegations of bias and/or dishonesty made [by Connie Cornelia Reshard] against [United States District Court] Judge John Garrett Penn, and court reporters Harry Deustch and S. Popejoy, and what appeared to be allegations by [her] of bad faith on the part of Judge W. Bryant all made during the course of

Accordingly, consistent with the Scheduling Order of November 14, 1996, this Respondent again sought dismissal of Petitioners' appeal. In response, on December 5, 1996, Petitioners filed a "Motion to Vacate Appeal No. 91-3542 [*Reshard II*]" and yet another Motion that the Court reconsider its Scheduling Order of November 14, 1996. On January 15, 1997, the Court of Appeals denied the Petitioner's Motion to Vacate *Reshard II*; it denied their motion to reconsider its Order that Petitioners refrain from re-briefing the propriety of the Trial Court's 1991 dismissal affirmed in *Reshard II*; and it dismissed this, the latest appeal, "based on Appellants' non-compliance with this Court's 11/14/96 Order. . . . " Pet. App. at 3. Petitioners thereafter filed a 24-page "Suggestion of Rehearing (or hearing) En Banc," which was denied on April 29, 1997.

Reshard v. Burnley, U.S.D.C. D.C. Civ. No. 87-2794 JGP . . . . "

Id., Petition for Certiorari at 6, n.2. *See also*, Recommendation of the Committee on Admissions, *id.* at Appendix, which reports that "in cases [Petitioners' counsel] litigated *pro se*, she has made allegations of bias and/or dishonesty against two Federal judges and three court reporters." *Id.* at 28.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeals Properly Determined that the Trial Court Dismissal of the Petitioners' Complaint had been Resolved in *Reshard II*.

The Court of Appeals clearly had jurisdiction to decide the 1991 appeal in *Reshard II*, and the matters decided in that prior appeal are the law of the case. The Order appealed in *Reshard II* stated, "The complaint in this case is DISMISSED with prejudice . . . [and] Plaintiffs' [sic] and their counsel shall pay to defendants [certain of] their expenses, including attorneys' fees. . . . " R10-396-3; Pet. App. at 36-38. Such a dismissal "clearly is a decision that 'ends the litigation on the merits and leaves nothing for the court to do but execute a judgment.' " *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. 1982). The fact that the District Court's 1991 Order was entered as a sanction does not mean it is any less a determination on the merits, for "a punitive dismissal [under Rule 37] is equivalent to an adjudication on the merits." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 592 (9th Cir. 1983). The dismissal of an action with prejudice, entered as a sanction for a party's failure to comply with a court order to provide discovery, is a final, appealable order. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 680 (1958); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1410 (9th Cir. 1990) ("default judgment entered pursuant to Rule 37 is an appealable final order").

Petitioners' appeal in *Reshard II*, taken before the amount of attorney's fees could be determined, did not

vitiate the finality of the 1991 Order of Dismissal. This Court, in *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988), established a "bright-line rule . . . that a decision on the merits is a 'final decision' for purposes of § 1291 [appeal] whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202. In *Budinich*, the issue was whether a judgment for damages entered in the plaintiff's favor was a "final order," under 28 U.S.C. § 1291, even though the plaintiff's petition for attorney's fees remained pending. Prior to *Budinich*, some of the courts of appeals had held that, if an award of attorney's fees was part of the "merits," then there could be no "final decision," for purposes of section 1291, until the amount of attorney's fees was determined. *Id.* at 201. Under that approach, the appealability of an order, disposing of the underlying action, depended upon the characterization of a still-pending claim for attorney's fees.

But in *Budinich*, this Court disapproved that approach, reasoning that the "time of appealability, having jurisdictional consequences, should above all be clear," *id.* at 202, and that "the § 1291 effect of an unresolved issue of attorney's fees . . . should not turn upon the characterization of those fees." *Id.* at 201. The Court thus held that a decision on the merits is final, whether or not a request for attorney's fees, attributable to the case, remains for adjudication. *Id.* at 202.

This "bright-line rule," announced in *Budinich*, has been uniformly held to apply to cases involving an award of attorney's fees imposed as a sanction. *See Cooper v. Salomon Bros., Inc.*, 1 F.3d 82 (2d Cir. 1993) *cert. denied*, 510 U.S. 1063 (1994) (for jurisdictional purposes, Rule 11

sanctions are not substantively different from statutory attorney's fees; to the extent sanctions are aimed at punishment or deterrence rather than compensation, sanctions are even more collateral to the main action than are statutory attorney's fees); *Turnbull v. Wilcken*, 893 F.2d 256 (10th Cir. 1990) ("order which fully resolved all substantial issues on the merits . . . was a final judgment as to the merits, even though certain issues regarding the award of [attorney's fee] sanctions remained unadjudicated"); *Cleveland v. Berkson*, 878 F.2d 1034 (7th Cir. 1989) (dismissal of plaintiff's action, for failure to state a claim, was a final, appealable order, notwithstanding the pendency of the defendant's Rule 11 motion for sanctions in the form of attorney's fees). It is thus "bright-line" clear that the Court of Appeals panel that decided *Reshard II* (the prior appeal herein) had jurisdiction to decide the appeal as it did.

It is likewise clear that the Court's affirmance, in the prior appeal, was of Petitioners' liability for Respondents' attorney's fees, just as much as it was an affirmance of the Trial Court dismissal itself. An order determining *entitlement* to attorney's fees is reviewable on appeal, even though the amount of attorneys fees has not yet been determined, where the issue is raised in an appeal from an otherwise final order. *Andrews v. Employees' Retirement Plan*, 938 F.2d 1245 (11th Cir. 1991). *Accord, Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675 (D.C. Cir. 1996). Because the dismissal with prejudice was a final, appealable decision, the Court of Appeals, in *Reshard II*, also had jurisdiction to review the District Court's concomitant

decision to sanction Petitioners' with liability for Respondents' attorneys' fees and expenses (a review it conducted at Petitioners' behest). In fact, all of the issues that Petitioners raised in the instant appeal (*Reshard III*) – except for the *amount* of attorneys' fees set after *Reshard II* – were also raised by them in the prior appeal.

Moreover, under the Doctrine of Law of the Case, "findings of fact and conclusions of law by an appellate court are generally binding . . . on a later appeal." *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994). The doctrine encompasses all questions previously decided by the court, including those decided by necessary implication. *Id.* The prior appeal in *Reshard II*, and the appeal in *Reshard III* with respect to which the instant Petition is pending, arose out of the same case and involved the same parties; and the Court of Appeals had explicitly found, in *Reshard II*, that the District Court had not erred in dismissing Petitioners' wrongful death action with prejudice. Pet. App. at 34. In connection with the appeal of that issue in *Reshard II*, Petitioners argued then (as they also do now) that the District Court's determinations should be reversed because (i) Respondents concealed and destroyed evidence and engaged in other misconduct; (ii) the dismissal sanction was unwarranted because the Petitioners' conduct was not improper; (iii) the District Judge and Magistrate Judge [and, now, various judges of the Court of Appeals] are biased against Petitioners; (iv) the District Court lacked jurisdiction to enter the 1991 Order of Dismissal; and (v) Petitioners' rights to "substantive and procedural due process of law" were violated. Thus, the disposition of these issues, in the prior appeal, is the law of the case.

The only issue that was before the Court below, in the instant appeal, was whether the District Court abused its discretion in its determination of the exact *amount* of attorneys' fees awarded.

2. It Was Within the Discretion of the Court Below to Limit the Scope of Briefing and to Thereafter Dismiss the Appeal When Petitioners Refused to Comply.

By motion in the Court below, Petitioners repeatedly argued that they should be permitted to re-brief, in *Reshard III*, the propriety of the Trial Court dismissal that had been affirmed in *Reshard II*. Thereafter, the Court ordered Petitioners "to file a corrected brief deleting all arguments that the District Court's dismissal of their complaint was improper," finding that "This issue was resolved against Appellants in [*Reshard II*, Case No.] 91-3542." Pet. App. at 10. In response to Petitioners' request for reconsideration, the Court of Appeals (through a panel of three additional judges) warned Petitioners to "file a corrected brief in full compliance" with the earlier order, or face dismissal "for want of prosecution." Pet. App. at 5.

The Petitioners deliberately disregarded the Order and instead filed a brief that was focussed almost entirely on the merits of the 1991 dismissal and which was rife with the same false and offensive accusations that the Trial Court and Court of Appeals had to deal with in affirming that dismissal in *Reshard II*. Had the Petitioners chosen, instead, to simply re-argue that the Court of Appeals had been without jurisdiction to decide *Reshard*

II (rather than to focus almost entirely on the "merits" of that prior appeal), or had they simply chosen to argue the only true issue below – i.e., whether the Trial Court abused its discretion in setting the amounts of fees and costs – then Petitioners would simply have lost their appeal on the merits. Instead, by having flagrantly disregarded the Order below, Petitioners deliberately invited the resulting dismissal, the discretionary review of which they now seek in this Court.

Yet the pending Petition does not challenge the authority of the Court of Appeals to impose what it explicitly warned would befall Petitioners (i.e., dismissal for want of prosecution); and it is clear that the Court of Appeals had such authority. *See generally, Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Unquestionably, the Courts of Appeal have inherent, discretionary authority to dismiss an appeal for want of prosecution. *Thomas v. Arn*, 474 U.S. 140, 147 (1985) ("Had petitioner failed to comply with a scheduling order . . . that court [of appeals] could certainly dismiss the appeal"); *Link v. Wabash*, 370 U.S. 626 (1962) (recognizing "inherent power" of court to dismiss for want of prosecution). *See also, Anderson v. Dunn*, 19 U.S. 204, 227-28 (1821) ("Courts are universally acknowledged to be vested, by their very creation, with power to impose silence . . . in their presence and submission to their lawful mandates"). Additionally, the Federal Rules of Appellate Procedure expressly provide that the failure of an appellant to take *any* step, other than the timely filing of a notice of appeal, is ground for "such action as the court of appeals deems appropriate, which may include dismissal of the appeal." Fed. R. App. P. 3(a). Courts of appeals have, on numerous

occasions, dismissed appeals where appellants have impeded timely processing. *See, e.g., United States v. Consolidated Freightways, Inc.*, 178 F.2d 756 (9th Cir. 1949); *Taylor v. S & D Enterprises, Ltd.*, 601 F.2d 175 (5th Cir. 1979); *MacNeil Bros. Co. v. Forte*, 253 F.2d 500 (1st Cir. 1958); *Barber v. American Sec. Bank*, 841 F.2d 1159 (D.C. Cir. 1988); *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132 (4th Cir. 1988). *See also, Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132, 134 (4th Cir. 1988) (court notes that the appellant's conduct, in failing to prosecute the appeal, was consistent with conduct before the trial court).

By virtue of *Reshard II*, it had been established, beyond peroration, that "[Petitioner/Petitioners' counsel] Connie Reshard's failure to listen to [the] court when ordered to do something necessary to move this case along to a fair and just conclusion . . . has continued unabated throughout the unfortunate history of this case"; that Petitioners have filed "frivolous but lengthy appeals of every order"; and that they had previously been guilty of "willful disobedience" of lawful court order and of engaging in "bad faith" efforts to "cause needless expense" to the Respondents. Yet, in *Reshard III*, of which they now seek review in this Court, Petitioners took absolutely no positive steps to process the appeal (other than filing the notice of appeal), until motions were filed and orders were entered. Then, after their multiple, non-compliant briefs were filed and stricken – and after having briefed and lost, by Motion, their argument that *Reshard II* was void – Petitioners received and acknowledged a clear and concise scheduling Order that they file a properly limited brief by a date certain, or that

their latest appeal be dismissed for lack of prosecution. Petitioners chose to defy that scheduling Order, thereby bringing, upon themselves, the necessary result below.

3. Argument Petitioners Abandoned – that the District Court Abused its Discretion in Determining the Amount of Attorneys' Fees – is Meritless.

By failing to prosecute their appeal in the Court below, Petitioners waived further review of the only matter that was properly the subject of that appeal, i.e., the Order determining the amount of attorneys' fees. Pet. App at 14. Nevertheless, in an effort to obtain discretionary review in this Court, Petitioners complain that "the District Court set attorneys' fees and costs too high, and without holding a hearing," arguing that "Whenever disputable issues of fact exist . . . an evidentiary hearing must be held." Petition at 26. However, Petitioners' argument, with respect to the merits of the appeal dismissed below, is meritless.

It is well settled that the District Court "has great latitude in formulating attorney's fees awards," *Gilmere v. Atlanta*, 931 F.2d 811, 814 (11th Cir. 1991), and that the District Court's determination will not be set aside "absent a clear abuse of discretion," *King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980), regardless of whether or not it conducts an evidentiary hearing. As this Court stated in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), "[a] request for attorney's fees should not result in a second major litigation." Rather, the general rule is that evidentiary hearings are only "[o]ccasionally" necessary and that it "is perfectly proper to award attorney's fees based

solely on affidavits in the record." *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). Thus, contrary to Petitioners' argument, it is not true that an evidentiary hearing is necessary "[w]henever *disputable* issues of fact exist." Petition at 26 (emphasis added). An evidentiary hearing is required only where: (1) an evidentiary hearing has been requested, (2) there is a genuine dispute of material historical fact, and (3) the written record is not sufficiently clear to allow the trial court to resolve the genuine factual dispute. *Norman v. Housing Authority of Montgomery*, 836 F.2d at 1303-04.

As ordered by the trial and appellate courts herein, this Respondent submitted appropriate fee-and-cost affidavits, as did other Respondents. Petitioners, on the other hand, chose not to submit counteraffidavits or other evidence of any kind. As a result, the District Court's factual findings are not only amply supported by the Record, they stand uncontested; and Petitioners can identify no genuine dispute of material historical fact in the Record. Thus an evidentiary hearing was unnecessary. *See In re Holywell Corp.*, 967 F.2d 568, 571 (11th Cir. 1992) (fee opponent had not "demonstrated that the facts present[ed] an appropriate exception to the general rule" that an evidentiary hearing is not required).

Moreover, Petitioners' failure to timely file specific objections to the Magistrate's factual findings, thereafter adopted by the District Judge, effectively barred them from challenging those findings below, in the absence of plain error or manifest injustice. *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993). *See, CNPq-Conselho Nacional v. Inter-Trade, Inc.*, 50 F.3d 56, 57 (D.C. Cir. 1995) (by filing objections to magistrate's

report and recommendation one day late, appellant failed to preserve its objections for appeal). *See also* Fed. R. Civ. P. 72 (Committee Notes) ("Failure to make timely objection to the magistrate's report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order"). Thus, even though the District Court did consider and overrule Petitioners' untimely and vague objections, Petitioners nevertheless had waived them in the Trial Court, just as they were to later do by their misconduct in the Court below.

4. The Continued Pendency of this Twelve-Year-Long Wrongful-Death Case – Dismissed as a Sanction in 1991 – is an Embarrassment that Ought Not to be Prolonged or Endured by this Court.

Through Petitioners' unseemly and seemingly unceasing efforts, this meritless case has long been a shameful embarrassment to the judicial process. The Petition herein, especially portions of the Appendix, suggests only "the tip of the iceberg" of what has gone on in this most unfortunate case. Underneath, there lies a huge, morass of a Record reflecting litigious viciousness and misconduct of the rankest order, perpetrated in and upon the courts below for over twelve years, by Petitioners and by Petitioners' Counsel. In 1991, after much patient cajoling and then clear and stern warning – and only after Petitioners engaged in clearly contemptuous if not felonious behavior – the Trial Court saw fit to terminate this ugly abuse; and, in the ensuing appeal (*Reshard II*), the Court of Appeals found that Petitioners' points were meritless and that the Trial Court's devastating findings were fully sustained by the Record.

Five years later, in what should have been a simple appeal of a tangential matter before the Court below, the Petitioners continued their abuses; and now they again come to this Court, this time seeking relief from the consequences of having shown their contempt for the Court of Appeals that ruled against them in *Reshard II*. So, once again, this Respondent respectfully requests this Court to spare the parties and the courts below – and, indeed, the judicial process – from continued abuse at the hands of Petitioners; i.e., that this Court decline to add any semblance of life to this now-concluding tale of litigation horrors. This case – regardless of any "fact" or argument that Petitioners may make up or conjure up in their effort to keep it alive – is simply not worthy of this Court's attention, much less its discretionary review.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM HOWARD DAVIS
Counsel of Record
WADSWORTH & DAVIS, P.A.
203 N. Gadsden Street, Suite 1
Post Office Box 10529
Tallahassee, Florida 32302-2529
(904) 224-9037

Attorneys for Respondent
Tallahassee Medical Center, Inc.
d/b/a Tallahassee Community Hospital